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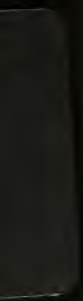
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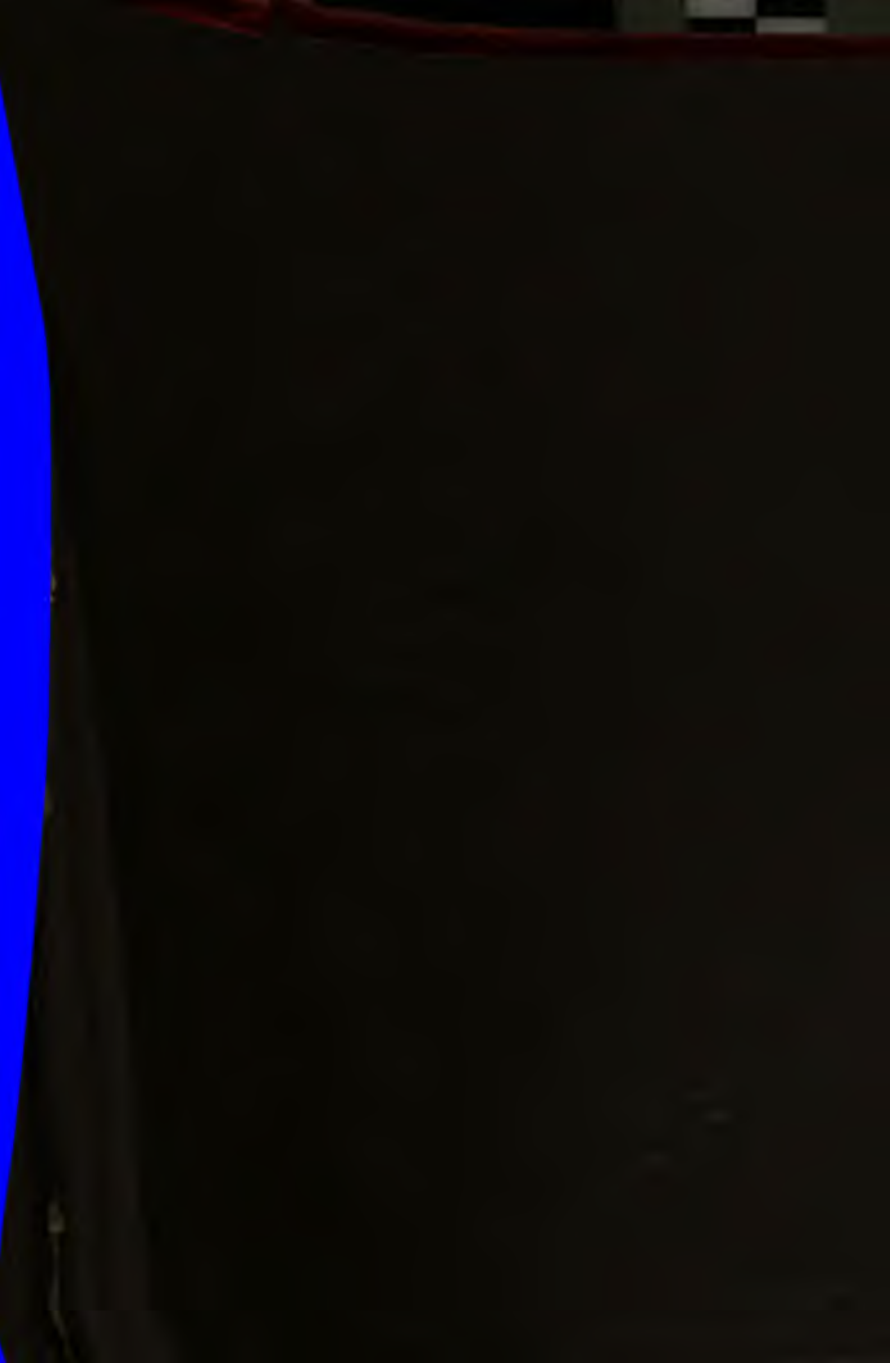
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AN ABRIDGMENT
OF
MILITARY LAW

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PREFACE.

THIS volume is an Abridgment of the Treatise on Military Law and Precedents, in two volumes, published by the author in 1886, of which a second and enlarged edition was issued in 1896. In arranging the present work, all the more extended notes, together with the discussions of doubtful questions, and most of the historical detail, have been omitted, and the original text has been otherwise very materially condensed. The Abridgment, first published in 1887, was prepared with a special view to the instruction of the Cadets of the United States Military Academy, and was adopted by the Secretary of War, February 14, 1887, as the text-book on military law in the law course of that institution.

The present (fourth) edition incorporates the changes in the law made during the late war with Spain.

WASHINGTON, D. C., January 1, 1899.



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MILITARY LAW.

PART I.

CHAPTER I.

THE SUBJECT DEFINED AND DIVIDED—CONSTITUTIONAL PROVISIONS.

MILITARY LAW is the law administered by the military power. It is divided into—I. Military Law Proper; II. The Law of War.

Military Law Proper is the specific law which governs the army, as a separate community, alike in peace and in war.

The Law of War is an exercise of military authority and jurisdiction over persons both civil and military, operative only in time of war or similar emergency.

These separate branches of the subject will be presented in Parts I. and II. of this treatise, respectively. As incidental to these, and to complete the work, there has been added a Part III., which treats briefly of the—*Civil Functions and Relations of the Military.*

Source of and authority for military law in general.—Historically, as will hereafter be indicated, our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore is in general referred to as the source of the military as well as the other law of the United States. Thus it is said by Chief Justice Chase, in the leading case of *Ex-parte Milligan*:* “The Constitution itself provides for military government as well as for civil government. . . . There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution.”

Specific constitutional provisions.—The provisions of the Constitution which may be regarded as the source or sanction of, or authority for, our existing military law and jurisdiction—the discipline of armies as well as the war power—are the following, viz.:

1. Those by which CONGRESS as the *Legislative* branch of the government, is empowered—“To define and punish . . . offences against the law of nations;” “To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;” “To raise and support armies;” “To provide and maintain a navy;” “To make rules for the government and regulation of the land and naval forces;” “To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;” “To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;” and further, generally, “To make all laws which shall be necessary and proper for carrying into execution the

* 4 Wallace, 137, 141.

foregoing powers " (*i.e.* those here recited together with various others set forth in the same section) "and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

2. Those by which the PRESIDENT, as the *Executive* power, is constituted "Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States;" by which he is empowered to appoint (generally in conjunction with the Senate), and is required to commission, the officers of the army, etc.; and by which it is made his duty to "take care that the laws be faithfully executed."

3. The provision of the Vth Amendment, that—"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, *except* in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

CHAPTER II.

MILITARY LAW PROPER—THE WRITTEN MILITARY LAW.

MILITARY LAW PROPER, or as we will now term it, in general, simply Military Law, in contradistinction to the law administered by the civil tribunals, consists, like the latter, in a Written and an Unwritten Law.

The Written military law.—This, which comprises much the greater part of the Law to be considered, is made up of :

I. The statutory code of Articles of War ; II. Other statutory enactments relating to the discipline of the Army ; III. The Army Regulations ; IV. General and Special Orders.

I. THE ARTICLES OF WAR.

The Articles, or Rules and Articles, of War, are statutory provisions for the enforcement of discipline and administration of criminal justice in the army, enacted by Congress in the exercise of the constitutional power "to make rules for the government and regulation of the land forces." In their origin, however, a majority of these Articles considerably *pre-date* the Constitution, being derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from preëxisting British articles having their inception in remote antiquity.

The British military code—*Articles of War and Mutiny Act.*—Special ordinances for the govern-

ment of English Armies on military expeditions are recorded as existing from the time of Edward the Confessor. These were succeeded by sets of Articles of War, which, commencing with the fourteenth, were matured in the seventeenth century. Of these the most complete was the code of James II. (1686-1688), which was largely based upon that of Gustavus Adolphus (1621).^{*} These Articles, which, with additions and changes from time to time made, continued to be issued down to a recent date, were not statutes (*i.e.*, legislative acts), but mandates of the Sovereign. Originally intended for use in foreign wars, they were inadequate for the punishment of grave offences of the soldiery within the kingdom and in time of peace, and this inadequacy was especially manifested on the historical occasion of the mutiny and substantial desertion, in 1689, of a body of Scotch troops, which, inclining to the cause of the Stuarts, refused to obey the orders of King William III. The existing law not extending to such emergency, there was thereupon enacted a statute, subsequently known as the "Mutiny Act," which in substance provided that officers and soldiers who should be guilty of mutiny or desertion within the kingdom should suffer death or such other punishment as a court-martial might inflict. This Act, which was the first statutory military law of Great Britain, was subsequently extended to offences committed beyond the seas, and, in being reënacted, as it was, from year to year, became in time greatly enlarged; many of the additions referring to offences and subjects also embraced in the Articles of War. Meantime the Articles (which had also been made operative both at home and abroad)

^{*} These codes are set forth in the Appendix to Vol. II. of the original treatise, of which this is an abridgment.

were likewise largely increased; so that, in 1879, the Act was swelled to over 100 sections and the Articles numbered nearly 200. The combined code contained many repetitions, lacked simplicity and perspicuity, and a revision became desirable.

* *The reform of 1879-1881—Army Act and Rules of Procedure.*—At length, in 1879, after nearly two centuries of existence, the Mutiny Act (and with it the code of Articles) was allowed to expire without renewal, and there was substituted for it an entirely new and comprehensive statute, entitled the “Army Discipline and Regulation Act.” In one of the sections of this Act the Sovereign was expressly empowered to make Articles of War and Rules of Procedure. No Articles have yet been, or are apparently likely to be, made, but extended Rules of Procedure were presently published, and the Act and Rules, revised in 1881 (when the title of the Act was changed to “Army Act”), constitute (with some subsequent amendments) the now-existing code for the royal military forces. The new code contains many admirable provisions, but is even more detailed and elaborate than its predecessor.

The American Articles of War.—Unlike the British articles, the American, as above indicated, are, and always have been, wholly *statutory*. The first code of such Articles was enacted by the Continental Congress early in our Revolutionary war, viz., on June 30, 1775. They were based mainly upon the existing British Articles, and in part also upon Articles adopted in Massachusetts in the preceding April for the observance of the troops of that colony. For this code was substituted in 1776 a second code, arranged in sections, which was materially amended in 1786. This amended code, being in force at the adoption of the Constitution, was continued in force by the first U. S. Congress, by Act of

Sept. 29, 1789, and remained operative till April 10, 1806, when a third code was enacted in which the arrangement by sections was abandoned. The Articles of 1806, with some few modifications, remained in force for nearly seventy years, when the present revised code of 1874 was adopted as a part of the Revised Statutes of the United States. This last code, (since amended in a few particulars,) contains our existing Articles of War, as set forth in the Appendix.

II. OTHER STATUTORY ENACTMENTS RELATING TO THE DISCIPLINE OF THE ARMY.

The second of the components of the WRITTEN MILITARY LAW consists of those of the public statutes which concern the government or discipline of the military service but are not included in the existing code of Articles, although some of them indeed might well be classed as articles of war. The statutes referred to are those relating to such subjects as—the authority of the Superintendent of the Military Academy to convene general courts-martial and execute their sentences; the jurisdiction of courts-martial over militia, cadets, retired officers, convicts at the Military Prison and others; the trial and punishment of officers or soldiers aiding or allowing the escape of convicts; the authority of judge advocates to issue process of attachment of witnesses, to appoint reporters, to administer oaths, and to be present in court; the competency of accused persons as witnesses; the disposition of the records of military courts; the restoration of dismissed officers; the dropping of officers for desertion; the trial by court-martial of officers dismissed by order; the composition of courts-martial for the trial of militia; the forfeiture of civil rights incurred by deserters; the military relations of post traders; the fixing of maximum punishments; the institution of

summary courts; the jurisdiction of courts-martial in cases of fraudulent enlistment, etc. These various statutes (which will be found in the Appendix) will hereafter be recurred to under the appropriate heads.

III. ARMY REGULATIONS.

What and how authorized.—*Regulations* are administrative rules or directions as distinguished from enactments. They exist in all the executive departments and are of very material service in the efficient administration of the Government. *Army Regulations* are authoritative directions as to the details of military duty and discipline. The authority for army regulations is to be found in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the army. His function as Executive empowers him, personally or through the Secretary of War, to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment. The former description of regulations scarcely differs from some of the Orders which remain to be separately noticed except in that they are of a more permanent character. Those of the latter species are more strictly “Regulations.”

From these two sources is derived an original and sufficient authority for army regulations in general, no authority or sanction on the part of Congress being required. In some indeed of the legislation on the subject, Congress has in specific terms authorized the framing of army regulations. Thus the enactment of March 1, 1875, still in force, expressly authorizes the Presi-

dent "to make and publish regulations for the government of the army in accordance with existing laws."

The present Army Regulations.—Sets of army regulations have been framed and issued, under the inherent authority of the President, or in pursuance of Acts of Congress, from time to time since the year 1813. The edition now in force—which is a revision prepared by a Board appointed by the Secretary of War—was published October 31, 1895. The Act of 1875, in authorizing the President in general terms to make and publish regulations, in effect authorized him to amend and modify existing regulations; but this power of amendment is also contained in the inherent power of the President to make regulations independently of Congress. The Regulations of 1895 have been somewhat amended and modified since their issue.

Legal effect and force of Army Regulations.—Army regulations, not being statutes, are not law in the sense of being a part of the "law of the land," nor are they embraced in the designation, "laws of the United States," but are law, and operative, *as regulations* only. As such, they are law to the army and those whom they may concern, and so far are binding and conclusive. The President, equally with the most subordinate officer, is bound by executive regulations: although he be empowered to alter or abrogate them, they are conclusive upon him while they remain in force. They are also recognized as conclusive upon the courts in cases to which they apply; and when duly made in and for one department of the government, they are in general conclusive upon any other department in which, in the settlement of accounts or claims, or otherwise, they are found to be pertinent to the subject.

The binding force and application to the army of the army regulations is illustrated by the fact that a failure to observe a regulation may constitute a military offence cognizable by court-martial under the 62d Art. of War. On the other hand, officers and soldiers, in complying with an authorized regulation, will be justified in law and protected by the courts.

But, to have legal force and effect, army regulations must not contravene existing law and must not legislate. A regulation which conflicts with the provisions of an Act of Congress, or with the Constitution, is of no validity. A regulation which assumes to direct as to a matter which is not within the province of regulation, but is properly a subject for legislation, is unauthorized and should be rescinded.

The Regulations for the Military Academy.—While the cadets of the West Point Military Academy are, as part of the Army, subject to the Army Regulations where applicable to them, they are also subject to special regulations framed expressly for their government as a separate branch of the military establishment. Sets of these regulations have been issued from time to time: those now in force consist of the set published June 1, 1883, with a few amendments since made.

IV. GENERAL AND SPECIAL ORDERS.

All lawful orders, written or oral, made or given by any competent military authority, may be said to be a part of the law military. The orders, however, to which reference is here made, are the so-called General or Special Orders issued from the War Department, Headquarters of the army, or headquarters of a military division or department, and which, though not of as

permanent a character as regulations, are generally printed and preserved as official documents. The General Orders which promulgate the proceedings of trials by military courts are now commonly designated as General Court-Martial Orders. General Orders are those applicable and addressed to the army, or the command, at large. Special Orders relate mostly to individual cases. The General or Special Orders which emanate from the War Department or Headquarters of the army, through the Adjutant General's office, are the orders of the President, who, in giving such orders, as in issuing army regulations, speaks by the Secretary of War or commanding general of the army. The General and Special Orders issued by the commanders of departments or divisions are of similar force and effect to the orders of the President, though within a narrower range. The thousands of General Orders published during the late war from the War Department and headquarters of high commands, and relating to trials by general courts-martial and military commissions, constitute a most material and valuable part of our military law and history. The subject of the admissibility in evidence of Orders will be referred to in the chapter on Evidence.

CHAPTER III.

THE UNWRITTEN MILITARY LAW.

THIS branch of the Military Law consists of certain established principles and usages, which, though neither enacted nor specifically ordained, are of binding force wherever applicable. They are referred to in the 84th Article of War as a means for the guiding of courts-martial in the administration of justice in doubtful cases, and are recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent.

This Unwritten Law includes: 1. The "customs of the service," so-called; 2. The unwritten laws and customs of war.

Usages or Customs of the Service.—These are not now numerous, the larger proportion having in the course of time changed their form by becoming merged in written regulations embraced in the General Regulations for the army. In the procedure of military courts, however, usage still governs, not only as to routine duties of members and judge advocate, but also as to sundry more important particulars. Thus, upon the Finding, a reference to usage as furnishing a guide for the judgment of the court is not unfrequently required to be made, especially as apposite to the question whether the facts alleged or proved constitute the military offence charged. For example, whether an order which the accused is charged to have disobeyed was a "lawful" order; whether the accused is to be consid-

ered as having been "on duty" at the time of his alleged offence; whether an officer charged to have been assaulted by a soldier was at the time "in the execution of his office"; whether certain acts amount to "conduct unbecoming an officer and a gentleman," or to "conduct to the prejudice of good order and military discipline"; in what acts consist the offences of false muster, mutiny, misbehavior before the enemy, breach of arrest, or desertion;—as to such questions, the court in deliberating upon its judgment (as also the commander in passing upon the same) will constantly recur to the general usage of the service as understood and acted upon by military men.

So, upon the Sentence,—to determine in some cases as to the *kind*, and in some others as to the *degree*, in amount or duration, of the proposed punishment; to decide whether the same is sanctioned by custom or is "unusual"; as also in some instances to indicate or direct as to the form of the execution of the penalty,—the court (or the reviewing authority) will not unfrequently have occasion to take into consideration the unwritten law or practice of the service.

Laws or Customs of War.—These are the rules and principles, almost wholly unwritten, which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations or peoples. Certain of these laws and customs will hereafter be referred to in considering particular articles of war which relate to offences committed only in time of war, as the offence of relieving or giving intelligence to an enemy in violation of Articles 45 and 46, the offence of forcing a safeguard made punishable by Article 57, and the offence of the spy. In the main, however, they pertain to the separate title of the LAW OF WAR.

Essentials of a Usage or Custom.—A usage or custom, at military law, must consist of a fixed and uniform practice of long standing, which is not in conflict with existing statute law or regulation. A custom of the service cannot be established by proof of isolated or occasional instances, but must be built up out of a series of precedents. It must also be a usage of the army, or of some separate and distinct branch of the military establishment. Moreover, no illegal or unauthorized practice, however frequent or long continued, can make a usage.

Custom of the Service as a Defence.—It will be apparent from the foregoing that an alleged military usage cannot avail an officer or soldier charged with a military offence, to vindicate his act, except where its existence and its lawfulness are susceptible of exact proof. As remarked in a General Order: "It is a hazardous thing for an officer to appeal to custom of the service to justify failure to obey orders or a departure from strict compliance with the articles of war." The existence in a command of an unauthorized practice, sanctioned by a commanding or superior officer, may sometimes extenuate the act of a subordinate who adopts it, but, unlike a legal custom, it cannot serve as a *defence*.

CHAPTER IV.

THE COURT-MARTIAL.

HAVING seen in what consists Military Law, we proceed to consider the tribunal by which it is mostly administered—the Court-Martial.

Its History.—The court-martial is a growth of the gradual development of the due administration of public justice. In the earliest history of armies, military offenders were judged and punished arbitrarily by their commanders. Later, when courts were first established, the same judges commonly passed upon all offences, civil and military, no distinctive military jurisdiction being yet recognized. Of this procedure an instance is presented by the English Court of Chivalry, instituted in the reign of Edward I., consisting of the Lord High Constable and Earl Marshal as judges. Meanwhile there was maturing in Europe the Franco-German system of administration of justice, of which a main feature was *trial by jury*. Hence naturally came the trial of military offenders by a jury of their own class—that is to say, by the *conseil de guerre* in France, the *militärgericht* in Germany, and later the court-martial in England. The English court-martial had become fully established under the Stuart kings, though it did not begin to attain its present importance till after the passage of the first Mutiny Act of 1689. Upon the Revolution of 1775, it was transplanted to our own military code and became a permanent institution in

our law. The Constitution empowered Congress to make provision for governing the army, and in the Vth Amendment sanctioned a military jurisdiction. But in legislating in view of these provisions, Congress did not originally *create* the court-martial, but (by the Act of September 29, 1789, and subsequent Articles of War of 1806) continued it in existence as previously established. Thus this court is perceived to be in fact older than the Constitution, and therefore older than any court of the United States instituted or authorized by that instrument.

Its Nature—An Executive Agency.—In view of its history it is clear (and so it has been decided by the United States Supreme Court in the leading case of *Dynes v. Hoover**) that the American court-martial is no part of the United States Judiciary, or “Judicial Department,” as defined in the Constitution. Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

A temporary summary tribunal—not a court of record.—As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action. Unlike the superior courts of record, it has no fixed place of session, no permanent office or

* 20 Howard, 79.

clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, and, though it keeps a record of its proceedings, it is not a "court of record" in the legal sense of the term.

Not subject to be appealed from.—Further, unlike those of the civil courts, the judgments or sentences of a court-martial are not subject to be appealed from or reversed by any civil tribunal, however high, but are within their scope final and conclusive. The court-martial is not only the highest but the only court by which a case of a military offence can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offences tried by a court-martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as such—than has a court of a foreign nation. This principle was clearly illustrated by the United States Supreme Court in the case of *Dynes v. Hoover*, above-mentioned. It has also been recently reasserted by the same court in the cases of *Wales v. Whitney** and *Smith v. Whitney*†—actions brought by officers of the Navy, who had been tried and sentenced by courts-martial, against the Secretary of the Navy—in which it was held that "no federal tribunal has any appellate jurisdiction over the court-martial or the offences which it is empowered to try."

The court-martial being an instrumentality of the military and executive power, it is only to the revisory military commander or the President, as the case may

* 114 U. S., 564.

† 116 U. S., 168; and see *In re Grimley*, 137 U. S., 147.

be, that an officer or soldier of the army can, properly speaking, *appeal* from its sentence.

Collateral revision.—It should be noted, however, that though the court-martial has as such no judicial superior to which appeal can be taken from its judgments, yet, where its action has been beyond its jurisdiction or powers, and, upon approval, has been effectuated, a person who has suffered therefrom is not without his remedy. Thus if confined under an illegal sentence, he may procure himself to be released by writ of *habeas corpus*, and for *any* illegal punishment adjudged and executed may recover damages in a civil suit. He may also, by suit in the Court of Claims, recover pay withheld from him under such a judgment.

A criminal court.—The court-martial—to illustrate further its nature—is exclusively a criminal court. Its function is the investigation of an offence and trial of an offender. It has no civil jurisdiction whatever, cannot enforce a contract, collect a debt, or award damages in favor of an individual. All fines and forfeitures which it decrees accrue to the United States. Its judgment is a criminal sentence, not a civil verdict: its proper function is to award *punishment* upon the ascertainment of guilt.

A court of honor.—One of the names of the old Court of Chivalry, a predecessor in English history of the court-martial, was “Court of Honor.” The same term of description has been occasionally applied to the modern court-martial. This designation, though less employed than formerly, is still applicable to the court-martial, for the reason that it punishes dishonorable conduct where the same affects the reputation or discipline of the army. It may try an officer for not being also a gentleman—a dereliction not cognizable by any other species of tribunal. The term “court of honor,”

however, is without *legal* significance, since a court-martial, though it may have occasion to pass upon conduct as honorable or dishonorable, is a court of law and justice, and proceeds against dishonorable conduct as an offence to be charged and proved according to the rules of criminal pleading and evidence.

As assimilated to a civil judge and jury.—We have noticed the connection in history between trial by court-martial and trial by jury. In its modern procedure this court is assimilated in sundry particulars to a civil jury; in others rather to a judge. Thus, in its taking of a statutory oath, its being subject to challenge, its hearing and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of objections to its own jurisdiction as well as to the sufficiency of the pleadings and the competency of the testimony, its authority to grant continuances and to adjourn, and its power to impose sentence, it is more closely assimilated to the judge.

The nature and characteristics of the court-martial will be abundantly illustrated as we proceed with the details of its powers and practice.

The different kinds of Courts-Martial.—There are ~~five~~ ^{four} species of courts-martial in our law: The General Court-Martial, the Regimental Court-Martial, the Garrison Court-Martial, the ~~Field-Officer's Court~~, and the Summary Court. The first three have been specifically authorized in our Articles of War from the beginning. The fourth was established by an enactment of July, 1862.* The last is a court authorized for time of peace by an Act of October 1, 1890. The

* This court was abolished by the recent Act of June 18, 1898.

four courts last-named, which may be designated as the *Inferior* courts-martial, will be treated of in a separate chapter.

The *General Court-Martial*, by far the most important of our military tribunals, will now be considered with respect to its Constitution, Composition, Jurisdiction, and Procedure.

CHAPTER V.

THE CONSTITUTION AND COMPOSITION OF GENERAL COURTS-MARTIAL.

I. THE CONSTITUTION OF GENERAL COURTS-MARTIAL.

THE law authorizing and relating to the constituting of general courts-martial is contained in the provision of the Constitution making the President the Commander-in-chief of the Army, in the Seventy-second and Seventy-third Articles of War, and in Secs. 1230 and 1326 of the Revised Statutes. By this law the authority to constitute these courts is vested in: 1, The President; 2, Certain military commanders.

1. Authority of the President to constitute General Courts-Martial.

The President is empowered to institute courts-martial—1st, as Commander-in-chief under the Constitution; 2d, in the special contingency indicated in the 72d Article; 3d, in the particular cases provided for by Sec. 1230, Rev. Sts.

As Commander-in-chief.—The Articles of War, in designating certain officers as invested with a general authority to order general courts-martial, do not mention the President. This, however, was quite unnecessary, since the President is clothed with a discretionary power to order military courts for the Army, by virtue of his constitutional capacity as Commander-

in-chief, irrespectively and independently of any article of war or other legislation of Congress. As Commander-in-chief of the Army, he may issue orders to his command, and orders convening general courts-martial are simply such orders. This power, repeatedly exercised by the President since the creation of the government, was not seriously questioned till 1872, when its authority was disputed in the case of Major Runkle,* retired. The result of that controversy was the affirmance of the existence of the power, and it has been since exercised in sundry important cases.

Under the 72d Article of War.—In the second clause of this article it is provided that when a military commander authorized by the first clause to “appoint” a general court-martial, is the “accuser or prosecutor” of an officer of his command proposed to be brought to trial, the court shall be appointed by the President. The purpose of this provision clearly was to debar a superior from selecting the court for the prosecution and trial of a junior under his command, and, as reviewing authority, passing upon the proceedings of such trial, or executing the punishment, if any, awarded him, in a case, where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused, if, indeed, he had not already prejudged the case.

Meaning of “accuser” and “prosecutor.”—The term “accuser.” means one who either originates the charge or adopts and becomes responsible for it; “prosecutor” one who proposes or undertakes to have it tried and proved. It is not essential that the accuser or the prosecutor should be the principal, or what is sometimes termed the “prosecuting,” witness, or indeed that he should be

* 19 Ct. Cl., 396.

a witness at all. The characters of accuser and prosecutor, though distinct, may be united in the same person: indeed where a commander is in fact the "accuser," he will, in the majority of cases, be found to be also the true prosecutor.

Whether a commander who has taken action in the case of an officer of his command proposed to be tried,—as by ordering his arrest, preferring or directing the preferring of charges, approving charges as preferred, etc.—is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and *animus* of such commander toward the accused or the case. Where his action has been taken under the orders of a superior, or is of a purely official character, the capacity in question cannot in general properly be ascribed to him. On the other hand, where, having personally originated or adopted the charges, he has himself preferred them as his own, or caused them to be preferred nominally by another for him, with the purpose of having them brought to trial, he is in general properly the "accuser," even if he may occupy no hostile or adverse position toward the accused.

Procedure under the Article.—The objection that the commander who has convened the court is also the accuser or prosecutor of the accused, is one which calls in question the legal constitution of the court as to the particular case, and its authority to take any action whatever therein. Thus, if the existence of the objection (or supposed objection) is known to the accused at or before the arraignment, it should be raised by him at that time. If not, it may be raised at a later stage. When raised, it may be supported by a reference to the original charges as preferred and signed, or by any other

material evidence oral or written. The accused, if necessary, may even call upon the commander himself to be sworn and examined. If the court sustain the objection, it should at once discontinue proceedings in the particular case, and report its action to the convening authority for his approval or otherwise.

Under Sec. 1230, R. S.—This statute (see Appendix) which is not operative in time of peace, and is, therefore, without present importance, authorizes and requires the President to convene a general court-martial for the trial of any officer who, having been summarily dismissed in time of war, applies in writing for such trial. This provision was enacted in March, 1865, near the end of the late war, and courts were ordered under it in but few cases. The authority vested thereby in the President has not been exercised since 1866.

2. Authority of Military Commanders to constitute General Courts-Martial.

This authority is conferred by the 72d and 73d Articles of War, and Sec. 1326, R. S.

Under the 72d Article.—This Article provides that—“*Any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary.*”

Meaning of terms.—The term “general officer commanding an army” applies at this time—a time of peace—only to the officer assigned to the command of the Army as a whole, that being the only “army” now recognized. In time of war, however, particular portions of the aggregate Army, intended for separate and independent service, may be organized and designated by the President as “armies;” such, for example, as were the “Army of the Potomac,” the “Army of the Tennessee,”

the "Army of the Cumberland," etc., during the late war. The commanders of such armies would be authorized to order general courts-martial under this Article.

The terms "division" and "department," as here employed, refer to the geographical or territorial commands, fixed and designated in General Orders, into which the public domain is commonly divided for military purposes. Divisions and departments are usually commanded by general officers. Colonels, however, are sometimes, temporarily at least, assigned to the command of departments, and when so assigned, but not otherwise, may order general courts-martial.

Scope of the authority conferred.—The general or colonel designated in the Article must be in the exercise of his command to authorize him to convene the court, though it is not essential that he be personally within the territorial limits of the command at the time of his issuing the order. His authority extends, of course, only to the convening of courts for the trial of officers and soldiers of the command. But such authority is complete and exclusive; and it is within his discretion to determine, in each instance, whether a court shall be ordered at all, or, if ordered, when and where (within the command) it shall be convened.

Delegation of the authority.—Inasmuch as the Article expressly designates certain particular commanders as competent to order general courts for armies, divisions, and departments, it follows, upon a familiar principle of law (*expressio unius exclusio alterius*), that no other commanders or officers shall be so authorized. A commander of a division, department or army cannot, therefore, delegate to an inferior commander or to a staff officer the authority vested in himself by this Article, or authorize such officer to exercise the same, *for him*, in his temporary absence or otherwise.

Under the 73d Article.—This Article authorizes the ordering of general courts-martial *in time of war* by commanders of “divisions” and “separate brigades.” It provides, however (similarly to Art. 72), that where the commander is the accuser or prosecutor of the party to be tried, the court shall be convened by the next higher commander. The *division* here referred to is the military organization defined in Sec. 1114, R. S., as consisting of at least two brigades; a brigade being defined to consist of at least two regiments of infantry or cavalry. The term *separate brigade* became a familiar one during the late war. It meant a brigade which was not a component part of any division but operated by itself, its commander reporting directly to the commander of the Army, army corps or department. The proper application of this Article to separate brigade commands was indicated in a General Order of the War Department of August, 1864. Being a provision for a time of war only, the article is at present (1894) without significance.

Under Sec. 1326, R. S.—This is the enactment which empowers the Superintendent of the Military Academy “*to convene general courts-martial for the trial of Cadets, and to execute the sentences of such courts, except the sentences of suspension and dismissal, subject*”—as it is added—“*to the same limitations and conditions now existing as to other general courts-martial.*”

This is an enactment of March 3, 1873, and is properly an article of war. The “Superintendent” indicated is the officer invested, by Sec. 1311, R. S., with the “immediate government and military command” of the Academy and of the military post of West Point. The above provision is sufficiently clearly expressed, and no serious question as to its construction is known to have been raised. The “limitations and conditions” which

it refers to are understood to be—(1) that sentences of dismissal or suspension, imposed upon cadets by courts-martial convened by the Superintendent, can become operative only through the order of the President given for their execution, upon the formal confirmation by him of the same, after the approval thereof by the Superintendent; (2) that where the Superintendent is the “accuser” or “prosecutor” of a cadet whose trial is contemplated, recourse should be had to the President for the ordering of the court; the cadet being here assimilated to an officer.

II. THE COMPOSITION OF GENERAL COURTS-MARTIAL.

This subject is regulated by the 75th, 77th, 78th and 79th Articles of War, and Sec. 1658, R. S. It will be considered under the heads of—1. Class and Rank of Members; 2. Number of Members.

1. *Class and Rank of Members.*

Eligibility for detail.—Art. 75 provides that “*General courts-martial may consist of . . . officers*,” and Sec. 1342, R. S., by which the code of Articles is prefaced, declares “that the word *officer* as used therein shall be understood to designate *commissioned* officers.” Commissioned officers only, therefore, may compose general courts. Commissioned officers are officers who have duly received and accepted commissions appointing them (or rather evidencing their appointment) to *offices* in the Army. An officer may be appointed without being commissioned: of this class are the Cadets of the Military Academy. A commission may be permanent or temporary—that is to say it may evidence an appointment made by the President and confirmed by the Senate, or merely an appointment of the class authorized, by

Art. II., Sec. 2, § 3, of the Constitution, to be conferred by the President during a recess of the Senate, to "expire at the end of their next session," and also called "commissions" in the Constitution. Thus an officer holding a commission of the latter description is, while it remains in force, as eligible to be assigned to duty on a court-martial as is any officer who has received the more formal and permanent commission issued upon the confirmation of his appointment by the Senate. Officers of the *Retired List*, however, are, by Sec. 1259, R. S., excluded from such duty. So the *Professors of the Military Academy*, whose rank is "assimilated" only (*i.e.*, all except the Professor of Law), cannot legally be ordered to sit on courts-martial, since the members of such courts must have actual military rank. With these exceptions all commissioned officers of the line or staff of the Army, of whatever rank, and whether or not having command, are eligible to be detailed as members of military courts.

Relative rank of members—Art. 79.—This Article, which provides that "*No officer shall, when it can be avoided, be tried by officers inferior to him in rank,*" is not prohibitory, but directory only, upon the convening commander. Its effect* is like that of the second clause of Art. 75 (see *infra*), and is to leave to the discretion of the commander, as the conclusive authority and judge, the determining of the question of the rank of the members, with only the general instruction that superiors or equals in rank to the accused shall be selected, so far as the exigencies and interests of the service may permit. Thus, that an officer is inferior in rank or grade to the accused does not render him incompetent to sit as a member of the court-martial, or subject him as such member to challenge. In practice, our gen-

* See *Mullan v. United States*, 140 U. S., 240.

eral courts, especially those convened for the trial of officers of high rank, have, in the majority of cases, been composed in part of officers inferior in rank to the accused.

Competency of certain classes of officers in certain cases—*Regulars, volunteers, etc.*—Art. 77 declares that—“*Officers of the regular Army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces, except as provided in Art. 78,*”—next to be considered. Thus regular officers cannot, as members of courts-martial, legally take part in the trial of volunteer or militia officers or soldiers. On the other hand, however, there is no law to prevent officers of volunteers or militia, in service in time of war, from acting as members of courts-martial for the trial of regular officers or soldiers.* In the late war volunteer officers were not unfrequently detailed upon such courts.

Marine officers—Art. 78.—This Article provides that, “*Officers of the marine corps, detached for service with the Army by order of the President, may be associated with officers of the regular Army on courts-martial for the trial of offenders belonging to the regular Army, or to forces of the Marine Corps so detached.*” Marines were detached for service with the army for considerable periods in the war with Mexico, and similarly on several occasions during the recent war, of which the taking of Fort Fisher was the most marked.

In what proportions the two different classes of officers will properly be associated on courts-martial is not indicated by the Article ; this matter being evidently left to be regulated by the convening authority in view of the comparative numbers of the officers of the two corps available for the duty ; of the particular corps—whether army or marines—of the offender or majority of offenders to be tried ; etc.

* See Circular 21 of 1898.

Composition of courts-martial for the trial of Militia.
—On this subject Sec. 1658, R. S., provides : “ *Courts-martial for the trial of militia*”—i.e., militia when called into the service of the United States—“ *shall be composed of militia officers only.*” In the original Article on this subject, of 1776, it was prescribed that militia courts should “be composed entirely of militia officers of the same provincial corps with the offender.” This restriction was omitted in the corresponding Article of 1806 ; and, under the now-existing law, the members of such courts may be selected from the entire body of militia officers in the service of the United States, without reference to the different States from which they may have been called.

2. *Number of Members.*

The law on this subject is all contained in Art. 75, as follows : “ *General courts-martial may consist of any number of officers from five to thirteen inclusive ; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*”

Five members a quorum.—It is clear from this Article that while a court of less than five or more than thirteen members will not be a legal body, a court of five will always constitute a *quorum*—that is to say, will always be a full and complete tribunal for the purpose of trial and judgment, and the addition of further members will not augment or in any manner affect its jurisdiction or authority. A less number indeed than five may meet and adjourn, and where there are but five members present at the outset and one is objected to (under Art. 88), the other four may deliberate and determine upon the challenge. But five members at

least must be sworn and constitute the court for the trial, and five must continue present and acting throughout the entire proceedings till the final record is completed and authenticated.

If the court begin with more than five members, the loss or absence of one or more does not affect its capacity provided at least five remain, and this rule applies through the entire life of the body. Thus five are sufficient to be re-assembled and to revise the sentence, though when it was originally adjudged, the court may have consisted of ten or thirteen members; and the sentence, as revised and finally adopted by the five, will be the sentence of the court.

On the other hand, if a court, beginning with five or more, loses, by the operation of a challenge, or by death, sickness, or other casualty, a member or members, so that it is reduced to four or less, its action must be at once suspended, since it has ceased, for the time at least, to be a court, and the objection to its proceeding is one which cannot be waived.

Authority to add members.—A general court, however, though reduced below five, is not necessarily to be dissolved, nor can it assume to dissolve itself or declare itself dissolved. Such dissolving is a function of the convening commander, who is also empowered, in his discretion, to continue the court by *adding* a member, or the requisite number of members, to bring it up to five, and when thus renewed, its power as a court is restored, and it may legally proceed with the trial. The adding, however, of new members to courts-martial, *after a trial has been entered upon*, has been of rare occurrence in our practice, and is generally of doubtful policy.

Effect of second clause of Article.—The concluding provision of the Article, that a general

court "*shall not consist of less than thirteen when that number can be convened without manifest injury to the service,*" was construed by the United States Supreme Court in the case of *Martin v. Mott* (1827),* and it was held that such provision was "merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."

In the form of Order for convening a general court, employed in practice, it is frequently added after the recital of the officers detailed, when less than thirteen—"A greater number of officers than those named cannot be assembled without manifest injury to the service." The mere fact, however, that less than thirteen *are* detailed will of itself, without this clause, constitute a sufficient indication of the determination by the convening officer, in his discretion, that a greater number cannot in fact be assembled without the prejudice to the service contemplated by the Article.

* 12 Wheaton, 34.

CHAPTER VI.

THE JURISDICTION OF GENERAL COURTS-MARTIAL.

THE subject of the jurisdiction of general courts-martial will be considered under the following heads:

1. The Place or Field over which such jurisdiction extends or within which it may be exercised; 2. The period of Time to which its exercise is limited; 3. The Persons who are subject to it; 4. The Offences which it embraces.

1. *The Place or Field of the Jurisdiction.*

It includes the entire United States.—The jurisdiction of general courts-martial is coextensive with the territory of the United States. That is to say, a general court assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever; such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region. While it will in general be more for the interest and convenience of the service to bring an accused officer or soldier to trial at or near the place of his offence, he may with equal *legality* be tried by a court convened (by competent authority) in any other part of the United States.

Extends to invaded territory of foreign enemy.—Further, such jurisdiction extends to the places or territory held or occupied by our armies when

invading the domain of a foreign nation with which we are at war. A court-martial, whether assembled in the foreign territory or in the United States, will have jurisdiction of military offences committed within such places equally as if committed on our own soil.

When extended to foreign friendly territory.—Such jurisdiction extends also to offences committed by our officers or soldiers within the lines or in the neighborhood of our armies, when in transit, by the permission of its government, through the domain of a foreign nation with which we are at peace. This on the principle of international law known as “*exterritoriality*,” under which, when the armies of one nation are privileged to enter or pass through the territory of another friendly nation, the laws of the former are deemed to continue to apply to its forces equally as if the same were within their own country. Such, for example, would be the legal status of our troops when permitted by the government of Mexico to cross the frontier in carrying on hostilities against Indians.

2. *The Time within which the Jurisdiction is to be exercised.*

As affected by the limitation of Art. 103.—This Article, as amended by the Act of April 11, 1890 (see Chapter XII), prescribes that for all offences, except “*desertion in time of peace and not in the face of the enemy*,” an officer or soldier shall not (unless meanwhile withdrawn by absence, etc., from the jurisdiction) be liable to trial by general court-martial, where the offence “*appears to have been committed more than two years before the issuing of the order for such trial*.” In the excepted case of desertion, it is provided that the party (unless meanwhile absent from the United

States) shall not be so triable where, at the time of his arraignment, more than two years have elapsed since the end of the term for which he enlisted.

The original Article was at one time regarded as *prohibiting* courts-martial from taking cognizance of offences committed after the two years indicated therein had elapsed. But the later rulings of the U. S. Courts were to the effect that the Article was not a restraint upon *jurisdiction*, but merely provided a *defence* to be taken advantage of by the accused at his option. In this view a court-martial may *legally try* an accused for an offence committed after the expiration of the period of the limitation. And it may also legally *convict* him thereof, unless, having specially pleaded the limitation (or taken advantage of it under the general issue), he proves that it was operative in his case.

The Article will be more fully considered, and the subject of the defence of the Statute of Limitations be examined, in treating of Pleas in Chapter XII.

As affected by the continuance of war.—While the termination of a state of war does not in general affect the jurisdiction of a court-martial over offences committed during the war, there are yet special cases in which, by the express terms of a statute, or by implication from its language, the jurisdiction of such a court over certain specific offences is restricted to the period of war. Thus the 58th Article (which will be considered in a subsequent Chapter) expressly makes the offences therein enumerated punishable by sentence of general court-martial only in time of war, rebellion, etc.; and if, in any case, the war which prevailed at the commission of the offence has ended before the same is actually brought to trial, the court will not be legally competent to take cognizance thereof under this Article. Similarly, it has been held that Sec. 1343, R. S., relating

to the offence of the spy, inferentially limits the trial by court-martial of a spy to the period of the duration of the war, etc., so that if not brought to trial before the war is terminated, he cannot be tried at all.

General rule as to term of amenability.—Except as thus affected, it is the general rule that the term of the amenability of an officer or soldier to the military jurisdiction is *the term of his service as such*. This term begins with the date of the acceptance of his appointment or commission by the officer, or the date of his enlistment by the soldier, and ends with death, resignation, dismissal, discharge, or other form of final separation from the military service.*

The mere fact that the period of a soldier's *enlistment* has expired does not necessarily end his amenability, provided of course he has not been *discharged*. In the case of *deserters*, it is expressly provided by Art. 48 that they shall continue to be subject to trial though the term of their enlistment has elapsed prior to their apprehension.

So, in the case of *any* offence, if the offender is arrested, or served with charges with a view to trial, at any time however short before the expiration of his period of service, the jurisdiction of the court-martial *attaches* to him, and he may be arraigned and tried *after* such expiration.

In one case, indeed, the law prescribes that the amenability shall continue after, and notwithstanding, discharge or dismissal—the case of the class of offenders made punishable by the 60th Article of War. This exceptional instance will be recurred to hereafter.

3. *The Persons subject to the Jurisdiction.*

By the Articles of War and other statutes, certain classes of persons are rendered, or declared to be, amen-

* That it continues till the end of a term of confinement under sentence see Act of June 18, 1898, Sec. 5. (G. O. 80 of 1898.)

able to the jurisdiction of courts-martial as follows: 1. The Army of the United States; 2. The Militia when called into the service of the United States; 3. Officers and Soldiers of Marines when detached for service with the Army; 4. Certain civilians subjected to military discipline in time of war.

1. The Army of the United States.—In this designation are embraced—The standing or regular Army; Volunteers; Drafted men.

The regular army.—The constituents of this army are the officers and enlisted men specified in Sec. 1094, R. S., and its amendments, *viz.*: certain general officers and their aids, certain officers and enlisted men of the staff departments, certain officers and enlisted men of the enumerated regiments of artillery, cavalry and infantry, certain enlisted men of the hospital corps and general service or unattached to regiments, a force of enlisted Indian scouts, the corps of professors and cadets of the Military Academy, and the officers and enlisted men of the retired list. The total enlisted force, exclusive of the “general service” and the hospital corps, is fixed by statute at 25,000 men. These members of the regular army, of whatever grade, are all *military* persons: there exists no longer in our service what was once styled the “civil branch” of the army. In time of *peace* the “regular” army ordinarily constitutes the entire Army of the United States.

*Volunteers.**—In time of war the regular contingent has commonly been supplemented by a force of volunteer troops: in the late war indeed the volunteers composed by far the greatest portion of our army. Though in some particulars of its organization assimilated to the militia, this force is in fact as well as in law quite distinct therefrom. Originated under the constitutional power “to raise armies,” not under the power “to

* See the important Act of April 22, 1898, relating to the status of volunteers.

provide for calling forth the militia," it is also distinguished from the militia in the persons composing it, in the period of their service, and in the duties upon which they may be employed. The militia is composed of citizens between 18 and 45 years of age, their term of service may not exceed nine months, and they cannot be used for the invasion of a foreign country or for military service abroad. The employment of volunteers is not limited by any of these restrictions. That this force, though differing from the regulars in that it is resorted to for a temporary purpose, is, equally with the latter, a part of the Army of the United States, has been expressly adjudged.

Drafted men.—Through the necessities of the government, and owing to the defects in the operation of the existing militia systems of the States, and to the fact that the *materiel* of the militia was limited to citizens, there came to be added to the Army, during the recent war, a further body of *drafted men*, who entered the military service, not as volunteers, but compulsorily under the provisions of the Act of March 3, 1863, c. 75. By this Act all able-bodied citizens of the United States and all aliens who had declared their intention to become citizens, between the ages of twenty and forty-five years, were constituted "national forces," and required to be enrolled subject to draft by the United States authorities. The Act was held by the courts to be a constitutional exercise of the power of Congress "to raise armies," and the troops raised by draft under the machinery which it provided were held to constitute a part of the "armies of the United States." As such they were of course subject to trial by court-martial.

2. The Militia when called into the service of the United States.—The Constitution, as we have seen, empowers Congress to "provide for

governing such part" of the militia "as may be employed in the service of the United States." In the exercise of this power, Congress, in 1795, enacted that the militia, when so employed, should be subject to the same Articles of War as the Army; and this provision is now embraced in Sec. 1644, R. S., and in the 64th Article of War. The employment of militia commences with their formal muster into the United States service at the place of rendezvous, and continues till their discharge by proclamation or order of the President. During this period they remain amenable to trial by courts-martial of the United States, which, however, as we have seen, must be *composed* of militia officers.

3. Marines detached for service with the Army.—It is provided by Sec. 1621, R. S., that the "*marine corps, when detached for service with the Army, by order of the President, . . . shall be subject to the rules and articles of war prescribed for the government of the Army.*" The relation of this corps to the Army, and the amenability of its officers and men to trial by courts jointly made up of regular and marine officers, are recognized in the 78th Article of War, and have already been considered in the previous Chapter. It need only be added that such amenability, during the continuance of the detached service, will be substantially of the same quality as if the offenders were members of the army proper.

4. Civilians subjected to military discipline in time of war.—The statutes by which courts-martial are empowered to take cognizance of offences of civilians in time of war, are the 63d, 45th and 46th Articles of War, and Sec. 1343, R. S., which is also an Article of War.

Under Art. 63.—This Article, which is the most important of the statutes indicated, provides as follows:

"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." This provision, which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant.

"Retainers to the camp."—This term may be deemed to include: 1. Officers' servants; 2. Camp-followers attending the army but not in the public service. Of the former, there have been but few trials by court-martial, their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines. Of followers of the camp,—members of soldiers' families, sutlers, sutlers' employés, newspaper correspondents,* telegraph operators, and some others, were, from time to time during the late war, brought to trial by court-martial or otherwise summarily disciplined. The *post traders*, who have succeeded sutlers, would, in time of war, be of the class of camp-followers.

"Persons serving with the armies in the field."—While this might perhaps be viewed as a general desig-

* See G. O. 24 of 1898 as to the jurisdiction over and status of correspondents, etc., within the lines of the army.

nation including all persons serving in the field with the army in any capacity, whether public or private, yet inasmuch as the terms "service" and "serving," as used in the Articles of War, have reference to public service—the service of soldiers and the like—it is preferred to treat these words as intended to describe civilians in the employment and service of the *government*. This class, during the late war, was considerably more numerous than that of the camp-followers or private retainers. It consisted mostly of civilian clerks, teamsters, laborers and other employés of the different staff departments, hospital officials and attendants, interpreters, guides, scouts, and men employed on transports and military railroads, etc.

It has been held by the Attorney General that the words "*in the field*" are applicable to Indian wars, and that civil employés of the War Department "serving with the Army in the Indian country during offensive or defensive operations against the Indians" are amenable to military trial for offences committed pending such service.

It has been similarly ruled that the mere fact that a civilian is serving, in time of *peace*, in connection with the military administration of the government,—as where he is a clerk of the War Department, or at a Military Division or Department headquarters,—will not be sufficient to subject him to military trial for offences committed during such service. This point was held in the case of a quartermaster's clerk, and also in that of a superintendent of a national cemetery.

Under Arts. 45 and 46.—These Articles, which will be considered in a subsequent Chapter, declare that—"whosoever shall relieve, correspond with, or give intelligence to, the enemy, shall be punishable with death or otherwise at the discretion of the court-martial." By the weight of authority, the general term "*whosoever*" is held to include civil equally with military persons;

and during the late war civilians, charged with a violation of one or both of the articles, were frequently brought to trial by courts-martial; their sentences, when convicted, being generally approved and executed.

Under Sec. 1343, R. S.—This statute, which will also be discussed later, provides for the trial by a military court and punishment of "*all persons*" who, in time of war, etc., shall act as *spies*. It appears never to have been questioned that the term "*all persons*" includes civilians, and persons of this class have repeatedly been tried and punished as spies in our wars.

These statutes to be strictly construed.—In view of the constitutional principle entitling civilians to be tried for their offences by a civil jury, it is clear that statutes subjecting civilians to the military jurisdiction, in time of war, should be strictly construed, and no doubtful case be allowed to be brought within their operation.

4. *The Offences which the Jurisdiction embraces.*

The offences cognizable by general courts-martial are those made so cognizable either by the Articles of War or by other statutes.

The offences cognizable under the Articles of War—*Specific and general offences.*—The offences of which mention is made in the code of Articles may be divided—First, into those which are distinguished by specific names and those which are designated under a general description. The former are those made punishable in all the articles which provide for the punishment of offences except the 61st and the 62d: the latter are those included within the general terms of these two articles. But these general terms include more particular forms and phases of misconduct than are contained in all the other articles combined, comprehending as they do all the dishonorable or disgraceful acts, com-

promising their military relations, of which officers may be guilty, and all the crimes other than capital, neglects, violations of army regulations, and disorders, of whatever nature, not enumerated in the specific articles, which may be committed either by officers or soldiers, and which are directly prejudicial to the order and discipline of the service.

Kinds of specific offences.—Second, the specific military offences may be divided into those which are purely military and those which are *also* crimes at common law. The former are those designated in all the specific articles except the 58th and 60th; the latter are those enumerated in these two articles. The former are desertion, absence without leave, mutiny, disobedience of orders, disrespectful conduct to a superior, false muster, sleeping on post, drunkenness on duty, cowardice, pillaging, etc.; the latter are the larceny and crimes accompanied with violence recited in Article 58, and the frauds, embezzlements, etc., described in Article 60.

Specific offences may also be divided into those which are peculiar to, or made punishable in, a time of war, and those which may be committed and are punishable at any time whether of war or peace. Of the former are those indicated in Arts. 9, 43, 45, 46, 57 and 58, and most of those specified in Art. 42: that described in Art. 44 is also properly a war offence. Of the latter are all the other offences set forth in the code.

No common-law grades of offences or offenders.—It is further to be said of the offences which are the subjects of the Articles of War that there is no distinction between them of *felony* and *misdemeanor*; all alike being simply military crimes. So, at military law, there is no distinction of offences as *principal* and *accessorial*; the Articles recognizing no principals, or accessories either before or after the fact, *as such*, but treating all accused persons as independent offenders.

No statutory grades or degrees of offences.—Nor are there any *statutory* grades of military offences. There are no *grades*, for example, of mutiny, desertion, cowardice or other purely military offence, though the instances of such offences may differ greatly in criminality and may call for very different measures of punishment. So, as to the offences made punishable in time of war by Art. 58—the statutory military law recognizes no such distinction in larceny as *grand* or *petit*, nor any *degrees* in murder, manslaughter, etc., such as are known to the laws of most of the States.

Minor included offences.—It is to be noted that the jurisdiction of a general court-martial extends to any minor offence which may be included in a specific offence charged. Thus, if desertion be charged, the court has jurisdiction of the minor offence of absence without leave which is included within it. So, if murder be charged, the court has jurisdiction of the manslaughter which is embraced therein; or, if robbery be charged, it has jurisdiction of the minor crime of larceny which every robbery involves. This jurisdiction will be further illustrated in the Chapter on the Finding.

Offences cognizable under other statutes.

—There remain a few statutes not included with the Articles of War, and mostly of a more recent date, by which military persons are made amenable to trial by court-martial for offences additional to those designated in the code. Of these, those of most importance are Secs. 1359 and 1360, R. S., by which officers and soldiers are made so amenable for the offences of allowing or aiding convicts to escape, or attempt to escape, from the Military Prison at Fort Leavenworth; and Sec. 3 of the Act of July 27, 1892, by which “fraudulent enlistment” is “declared a military offence and made punishable by court-martial.”

CHAPTER VII.

THE PROCEDURE OF GENERAL COURTS-MARTIAL—
ARREST OF ACCUSED.

WE come now to the extended subject of the Procedure of General Courts-Martial, beginning with the Arrest and ending with the Sentence. This subject will be presented in the following ten Chapters.

THE ARREST.

Before a court-martial is assembled for the trial of an officer or soldier charged with a military offence, the accused is usually and regularly (though not invariably) placed in arrest.

The subject of arrest is regulated in part by the Articles of War (Arts. 65 to 71, and Art. 24), the Army Regulations (Art. LXXIV), and the Regulations of the Military Academy; and in part by military usage. It will be considered under the heads of—1. Arrest of officers; 2. Arrest of cadets; 3. Arrest of enlisted men.

1. *Arrest of Officers.*

Occasion and ground for the arrest.—It is declared by par. 899, Army Regulations, that—"Officers will not be placed in arrest for light offences. For these the censure of the commanding officer will, generally, answer the purpose of discipline." Where, however, the offence is such as to call for trial and punishment, the strict course to be pursued is prescribed in the 65th Article of

War, as follows: "*Officers charged with crime shall be arrested and confined in their barracks, quarters or tents, and deprived of their swords by the commanding officer.*"

The term "*crime*," as here used, is to be construed not as meaning civil crimes only, but as employed in a general sense and including *all military offences*, whether those purely military, or those which, while cognizable in their civil aspect by the ordinary criminal courts, are also in their military aspect cognizable by court-martial under Arts. 58, 60 and 62.

The occasion and authority for the arrest of an officer thus is that he shall be *charged with a material military offence*. It is not necessary that a formal charge be *served* upon him to validate the arrest: an officer is not entitled to know forthwith why he is arrested. In general, however, a copy of the charges should, if practicable, be served upon the officer at the time of the arrest.

Form of the arrest—*The order.*—In lieu of the warrant or other process of the general criminal law, a military arrest is, by the usage of the service, regularly imposed by an *order*, and this order may be either verbal or written. The order of arrest is given by the commander, either directly, or, as is more usual, through the adjutant or other staff officer. There is no prescribed form of expressing the order of arrest. A simple and usual form is a direction to the officer that he "will consider himself in arrest," or "consider himself in arrest and confine himself to his quarters," till further orders. A requirement that he surrender his sword is sometimes added, but it is not necessary.

The confinement.—The "*quarters*" to which the arrested officer is required by the Article to be confined are his military residence, whether consisting of a tent or tents, a barrack, a separate tenement assigned to him

at a post, or a house or rooms occupied by him at a station where public quarters are not furnished by the government. The limits of such quarters he cannot, of his own authority, exceed without being guilty of breach of arrest—the offence made punishable by the last clause of the Article, yet to be considered. Except where an attempt to escape or some act of violence is to be apprehended from the confined officer, or where he is charged with an exceptionally heinous crime, or an aggravated breach of a previous arrest, he is not in general to be held under guard, and the commander will not properly place a sentinel over his quarters. So, the restraint imposed should not be of such a character as to prevent the due preparation of his defence. For an undue or unreasonable exercise of the power of arrest and confinement conferred by the Article, the commander will himself become amenable to charges.

The deprivation of the sword.—The theory of this further feature of a strict arrest under the Article is, that it formally suspends the officer from the functions of his office, and especially from the exercise of command. But though the article directs that the sword be taken, an actual taking is not considered as *essential* to an arrest. But that the sword is not in fact taken does not authorize the officer to appear with it during the continuance of the status of arrest.

Extension of limits of arrest.—“*Close*” and “*open*” arrest.—The strict arrest defined by Art. 65 is what is termed a “close” arrest. A close arrest, however, may be converted into an open arrest at the discretion of the commander. Par. 898, A. R., declares that—“An officer will remain in arrest until more extended limits have been granted by the commanding officer on written application. Close confinement will not be enforced except in cases of a serious nature.”

Larger limits than those of his "quarters" are indeed sometimes assigned to the officer in the original order of arrest. The discretion of the commander as to the allowing of extended limits will be guided by a consideration not only of the nature of the offence and the conduct of the accused prior to and at the arrest, but of his state of health, the facilities required to enable him to confer with his counsel and prepare for his defence, the commodiousness or the reverse of his quarters, the season, climate, etc. The certificate of the medical officer, when the accused is ill, as to his physical or mental condition, the space properly required by him for air, exercise, etc., will always be deferred to.

The *limits* usually prescribed or conceded, where a close arrest is not imposed or continued, are commonly the boundaries of the camp, post, or station, or of a certain circuit or neighborhood of the quarters of the officer. At a post upon a military reservation, the range of the reservation, if not too extended, would in a proper case be accorded. The limits once fixed may even be enlarged upon a second application. As to the number of applications there is no restriction: larger limits may first be refused on account of misconduct of the officer, and granted after his behavior has improved. In some cases the scope allowed, in view of the rank of the party, the nature of the offence, etc., is so wide and general that the arrest becomes little more than a mere form.

Deferring of arrest till trial.—The arrest of officers is so much a matter of discretion that cases are recognized in which arrest is not required to be imposed until just before trial. Par. 900, A. R., prescribes that—"A *medical officer*, charged with the commission of an offence, need not be placed in arrest until the

court-martial for his trial convenes, if the service would be inconvenienced thereby, unless the charge is of a flagrant character." Other instances also may arise where, because the officer is engaged upon some highly important service, or for other controlling reason, it may not be desirable to order him in arrest till the eve of trial.

Omission to arrest.—Arrest may be omitted altogether without affecting the jurisdiction of the court or the validity of the proceedings or sentence. An officer ordered to appear before a court martial for trial cannot refuse to appear on the ground that he has not been arrested, or plead the omission in bar of trial. An omission to arrest, however, is an irregularity which must in general be prejudicial to discipline and the due administration of justice.

By whom the arrest is to be imposed.—Art. 65 indicates the "commanding officer" as the agent of arrest, and par. 897, A. R., declares: "Commanding officers only have power to place officers in arrest, except as provided in the 24th Article of War."

By the term "commanding officer," as applied to the *line* of the Army, is meant the chief of the complete integral command or separate organization to which the officer is attached or with which he is serving—as the regiment, detached company, detachment made up from various companies or corps, garrison, post, etc. As applied to the *staff*—the "commanding officer," in the sense of the Article, of an officer of the general staff would ordinarily be either the chief of the staff corps of which he was a member, or the division or department commander at whose headquarters or under whose immediate command he was serving; or, if his station of duty were a separate post, the officer, superior in rank

to himself, in command of the post, provided he were at the time under the orders of such post commander.

Excepted cases—Arrest by others than the commanding or superior officer.—The exceptions referred to in par. 897, A. R. (above cited), as authorized by Art. 24, are those of "quarrels, frays, and disorders," on the occasion of which any inferior officer or non-commissioned officer of the Army is empowered to place in arrest the participants though they be of superior rank. This article will be considered hereafter. A further rare exception to the general rule, growing out of the *necessity* of the occasion, is recognized by the authorities in a case where, by reason of some gross misconduct or criminal incapacity of a senior, the discipline of the command is paralyzed, and the next junior is justified in placing the senior in arrest and temporarily superseding him in authority.

Status of arrest.—An arrest once duly imposed detaches the officer from the functions of his office: he may not assume to command or to perform any military duty. At the same time a certain line of conduct becomes obligatory upon him. If closely confined, he cannot leave his quarters: if he does so, he will render himself amenable to trial and to a sentence of dismissal for the offence of breach of arrest, hereafter to be considered. If his arrest is an "open" one—the privilege of extended limits having been accorded him—he is considered as at large upon his parole of honor, and, if he exceeds the limits assigned, he is liable to trial for a violation of the 62d Article of War. He should also be especially circumspect in conforming to regulations and orders so far as they apply to him; the fact that he is no longer a free agent not entitling him to consider himself irresponsible. In his relations with his superiors he should be governed by par. 901, A. R., which

declares: "An officer in arrest will not visit officially his commanding or other superior officer unless directed to do so. His applications and requests of every nature will be made in writing."

On the other hand, it devolves upon the commander to treat in a similarly formal and ceremonious manner an officer whom he has placed in arrest; all orders or communications made to him being properly transmitted in writing and through a staff officer.

The status of arrest affects in no manner the right of the officer to the pay and allowances of his rank. Unless in arrears to the United States, or held as a deserter, he is entitled to be paid precisely as if he had not been arrested.

An officer in arrest is not disqualified to prefer charges.

But an arrested officer cannot properly be allowed a leave of absence, except in some extreme case, as where considerations of humanity or justice require the granting of the indulgence, and in such a case the arrest will properly be temporarily suspended.

Release from arrest.—Subject to the provisions of Arts. 70 and 71, yet to be noticed, the matter of the release of an officer from arrest is, in general, within the discretion of the commander by whom the arrest was ordered. An arrest, being imposed with a view to *trial*, is commonly not discontinued till the trial has been completed and the judgment of the court finally acted upon. An arrested officer cannot release himself from arrest, and a court-martial can no more release from arrest than it can arrest an officer. Even its acquittal does not enlarge the accused: it still remains for the proper commander to discharge him from the arrest as such, in and by the written order promulgating the proceedings, or otherwise.

Constructive release.—An officer may sometimes be released from arrest constructively—i.e., by the force of circumstances; as where, being in arrest in time of war, he is ordered upon duty, or allowed to do duty—as, for example, to go into an engagement with his regiment.

Limitation of period of arrest of officers by Arts. 70 and 71.—Art. 70 directs that—“*No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*”—The use of the word “confinement” indicates that the Article was intended to apply to cases of officers in *close* arrest. The term “can be assembled” is to be construed as meaning *can reasonably*, in view of the exigencies of the service, be assembled. In its original form, in the codes of 1775 and 1776, the Article was phrased—“*can conveniently be assembled.*” As to officers this Article has been materially modified by the provisions of Art. 71.

Art. 71 is in full as follows:—“*When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried whenever the exigencies of the service shall permit, within twelve months after such release from arrest.*”

This addition to the Code, enacted in 1862, is comprehensive in its terms and applies to all arrested officers, whatever the form of the arrest, whether "close" or "open." Its evident policy was to preclude protracted arrests and secure prompt trials. Except as to the occasions expressly indicated, of cases occurring "at remote military posts or stations" (which are left to be governed by the provision of Art. 70 just considered), it is unqualified and mandatory. The term of the officer's arrest—instead of remaining dependent upon the uncertainties attending the assembling of the officers necessary and proper to compose the court, the collecting of the witnesses at the place of trial, the movements of the army in war, or other incidents of the service—is limited by the Article absolutely and under all circumstances to certain periods. If charges are not served upon him within eight days after the arrest, "*the arrest shall cease.*" If, having been duly served with charges, he is not brought to trial within ten days after the arrest, or—where the exigencies of the service prevent a trial by that time—within forty days at the longest, "*the arrest shall cease.*" An enactment thus mandatory and explicit in the conferring of individual rights cannot be disregarded or evaded by a commanding officer.

Breach of arrest.—Art. 65, in providing for the close arrest of officers, further declares: "*And any officer who leaves his confinement before he is set at liberty by his commanding officer, shall be dismissed from the service.*" The offence of breach of arrest is here restricted to the single act of the quitting of close confinement by the officer before he is duly liberated therefrom. Acts of dereliction or misconduct, by an arrested officer, short of or other than this, though chargeable as

offences under Art. 62 or otherwise, will not constitute the particular offence here defined.

The leaving of the confinement.—The intention or motive of the officer in leaving his confinement is not material, nor is the distance he may go, nor the period of time during which he may be absent. In the cases, published in the General Orders, of officers convicted of this offence, the same is alleged to have consisted in visiting without permission the quarters of the commanding officer, or those of another officer, at the same post; in going to the guard-house or visiting the guard; going to the sutler's store or post exchange; attending as a spectator a trial by court-martial; similarly attending a parade of the battalion; riding or walking outside the camp; visiting a place of entertainment near the camp; going outside the post into the neighboring town, etc.

Defence.—It is no defence to this charge that the officer was innocent of the offence for which he was arrested and confined. Even if innocent in fact, his arrest would not necessarily be illegal; the commander being, in his discretion, authorized to arrest upon reasonable grounds of suspicion. Nor is it any justification for a breach of arrest that the quarters of the officer were in bad repair or otherwise unsuitable as a dwelling; or that the arrest, by reason of the unnecessary placing of a guard over the quarters, or otherwise, was unjustifiably severe: in such cases the officer's proper course is to apply for relief to the commander, or, if he refuse it, to the proper superior. But that the arrest was ordered by an officer without authority to impose it would be a complete defence.

2. *Arrest of Cadets.*

In the main the principles applicable to the arrest of officers will apply also to the arrest of cadets. Specific provisions, however, on the subject of the arrest of *cadets* are contained in pars. 264 to 269, of the Regulations of the Military Academy; and in par. 107, "*arrest, or confinement to his room or tent or in the light prison,*" is made imposable as a *punishment*. But arrest proper, as the term is employed in the Articles of War, is not *punishment* and should not be confounded with it.

3. *Arrest of Enlisted Men.*

This subject is regulated mainly by the 66th and 70th Articles of War, but in part also by Articles 67, 68 and 69.

Provision of Article 66.—This Article declares that: "*Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.*"

Its general effect.—The term "crimes," like the word "crime" in Article 65, includes all substantial military offences, both those purely military and those having a civil aspect. The Article prescribes a general rule of administration and discipline. Except so far as may be authorized in the case of cadets, we have in our law no system of disciplinary punishments, imposable by commanding officers independently of courts-martial, such as is found in most of the European codes. Our soldiers, therefore, when, as it is expressed in the Article, "charged with crimes," must—be legally punished—be "tried by court-martial." The great majority indeed of their offences are disposed of, comparatively summarily, by the inferior courts. But in all cases, the trial, by the direction of this Article, is to be preceded by arrest in the form of *confinement*.

By whom the arrest is to be made.—Strictly, the arrest should be made by, or by the order of, the company commander or other immediate commander of the soldier. In practice, the arrest of private soldiers and inferior non-commissioned officers is necessarily in a measure delegated by company commanders to their first sergeants or other superior non-commissioned officers.

Form of the arrest.—The *private soldier*, when placed in arrest, is confined in the guard-house or other appropriate place of restraint, a sentinel being usually posted either without or within. [An exception, however, has recently been engrafted upon this rule in the case of enlisted men proposed to be tried by *summary court*, who are, by General Orders, required to be “placed in arrest in quarters.”] As to *non-commissioned officers*, it is directed in par. 904, A. R., that they “will not be confined at the guard-house in company with privates, but will be placed in arrest in their barracks or quarters, except in aggravated cases or where escape is feared.” The phrase “placed in arrest, etc.,” as here used, evidently imports a mode of arrest similar to that prescribed for officers by Article 65.

Status of arrest—Treatment.—A prisoner is to be presumed to be innocent till duly convicted, and till thus convicted, he cannot legally be punished as if he were guilty or probably so. The arrest by confinement of an enlisted man with a view to trial, and for the purposes of trial, is wholly distinguished from a confinement imposed by sentence. It is, as heretofore remarked, a temporary restraint of the person, not a punishment, and should be so strict only as may be necessary properly to secure the accused. Anything further is unauthorized. The imposition upon soldiers, while under arrest, of disciplinary punishments is, in our ser-

vice, wholly illegal. Placing irons on a soldier, while confined awaiting trial or sentence, can be justified only when the same may be necessary, or a proper precaution, to prevent an escape or the doing of violence.

Neither hard labor nor severe service should be exacted of a soldier while remaining in arrest. Enlisted men in confinement, awaiting trial or sentence, should not be assimilated in their treatment to those under sentence or required to perform labor with them. They should, however, be given proper exercise, and may be put on drill or other light duty. (See Par. 907, A. R.)

A soldier, upon arrest, cannot properly be deprived of money or other property belonging to him, unless there be reasonable ground for apprehending that he may attempt to escape, or violate discipline, and that the possession of such property may facilitate his doing so. In such case the same may be taken in charge by the commander, to be returned at the conclusion of the proceeding.

Term of and release from arrest—Arts. 66 and 70.—Art. 66 declares that the confinement in arrest shall continue until the soldier is "*tried by court-martial or released by proper authority.*" Art. 70 directs that: "*No . . . soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*"

Effect of Art. 66.—The former provision, while it contemplates that the arrest shall be made with a view to trial, yet justifies the commander in terminating it without a trial, if in his judgment the facts as ascertained do not call for one, or a proper court cannot be assembled within a reasonable time. "Proper authority" to order a release would be the commander of the post, detachment, etc., or, where the case has passed beyond his official control, the department commander

or other proper military superior at the time. Subject to the conditions of the statute of limitations, a release from arrest constitutes no impediment to a re-arrest and trial at a subsequent date.

Effect of Art. 70.—The intent of this Article evidently was to establish that the period of the soldier's confinement in arrest should not be left to be determined by the convenience of the commander, but that the court for his trial should be assembled at the earliest date at which, by the exercise of reasonable diligence, the members could be brought together; the term of eight days being at the same time indicated as a reasonable period, not in general to be exceeded, for ordering and collecting a court.

The unreasonable detention of soldiers in arrest and confinement without trial, contrary to the letter or spirit of this Article, would be a serious military offence subjecting the commander himself to charges and trial.

Provisions of Arts. 67, 68 and 69.—These Articles provide for the commitment of arrested soldiers (and other prisoners) to the guard-house, and for their custody and disposition; these provisions may, therefore, properly be referred to in this connection.

Art. 67 in substance enjoins that an arrested soldier shall not be committed to confinement except upon a specific written charge entered against him in the guard-book or otherwise communicated to the officer of the guard—a direction supplemented by par. 908, A. R., which provides for the discharge (unless otherwise specially ordered) of prisoners “without written charges” at the next guard-mounting.

Art. 68 aims to preclude the unreasonable detention without trial of arrested soldiers (and other prisoners) by requiring that their names and offences as charged, with the name of the committing officer, be reported in

writing every twenty-four hours to the commanding officer of the post, etc., for the proper disposition—*i.e.* for trial or otherwise.

Art. 69 makes punishable the release by an officer, without proper authority, of a soldier duly committed to confinement, as also the suffering such a soldier to escape. The latter offence may consist either in a voluntary act or an act of negligence. The fact that the officer knows or believes the soldier to be entirely innocent of the charge upon which he has been confined will not justify his allowing his prisoner to go at large, in the absence of the "proper authority."

CHAPTER VIII.

THE CHARGE.

THE Arrest of the accused is usually accompanied or presently followed by the service upon him of the Charge or Charges upon which it is proposed that he be tried. Here then may properly be presented the general subject of the military Charge, as framed, preferred, completed and served, leaving the forms of specific charges to be indicated in the Appendix.

Form and requisites of the Charge.—The Charge, in the military procedure, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused. As formally prepared, it is divided into two portions—the *charge*, or designation of the specific military offence believed to have been committed ; and the *specification*, or statement of the acts or omissions of the accused claimed to constitute the offence named in the *charge*.

The *charge* may consist (1) of a word or words specifying the offence, as “Desertion,” “Drunkenness on duty,” “Misbehavior before the enemy;” or (2) it may be expressed as “Violation of the — Article of War,” naming the Article under which it is preferred ; or (3) it may combine the two forms and be phrased as “False Muster in violation of the 14th Article of War;” “Disobedience of orders in violation of the 21st Article,” etc.

The *specification*, in its statement of the constituents of the offence, should be appropriate to and support the charge. Where there are several specifications, each

should be complete and independent of itself, and sufficient *per se* to sustain the charge. It is not essential, but it is not unusual and is often desirable, that a *list of the witnesses*, by whom it is proposed to prove the allegations, should be appended after the specification or specifications. But the addition of such list (which is no part of the Charge) will not oblige the prosecution to introduce the witnesses named, nor estop it from introducing such other witnesses as may be deemed material.

Purposes and uses of the Charge.—The main objects of a written Charge are—1. To inform the accused of the precise offence attributed to him, so that he may intelligently plead to, and defend himself against, the same on the trial, and further may not be subjected to a second trial for the same act ; 2. To so advise the court and reviewing officer of the nature of the alleged offence that the former may rightly try the same, and the latter may understandingly pass upon the proceedings.

Particulars of the statement.—The Charge, therefore, like an indictment, should be clearly worded, precise in its details, unambiguous in its descriptions, and devoid of technicalities and superfluous matter. It should not enunciate legal propositions, or recite facts of the evidence by which it is to be proved, except so far as may be necessary to describe the offence. It should specify the name, office, rank, etc., of the accused person (or persons if two or more are joined), with such particularity as to identify him (or them), and designate the time at or about which and the place at or near which the offence was committed. If the statement involve the description of a writing, as a written order disobeyed, an official paper falsified, or an improper communication made or published, the same should either be recited *verbatim* in the specification, or its material

substance fully set forth. Care should be taken that the charge be laid under the proper Article, and that its allegations so follow the Article as to cover all the parts of the description of the offence as defined therein.

The importance of a clear, logical and legally sufficient statement of the offence in the charge and specification is obvious from the fact that the Charge is the basis and starting point of all the subsequent proceedings of the trial.

The preferring of Charges—*Charges to be well founded.*—Only such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial. The preferring of charges, without a proper investigation of the facts in the first instance—a neglect of duty which may entail, besides a needless waste of time spent in the trial, the arrest and confinement of an innocent person—has been repeatedly severely reflected upon in General Orders. Charges indeed should not be preferred at all where by the use of a proper and judicious discipline a recourse to a trial may be avoided. (See G. O. 73 of 1892, cited in Chapter XVIII.)

Charges not to be frivolous or malicious—All charges should be substantial and made in good faith. Where, as the result of imperfect investigation or otherwise, frivolous charges are preferred, or where the charges are actuated by a hostile *animus* and are not in themselves well-founded they are not a proper basis for a trial by court-martial. When such charges have been tried, they have not unfrequently exposed those preferring them to grave censure and in some cases to severe punishment.

To be preferred against the responsible party.—The charge in every case should be preferred only against the person responsible for the act. Where there is any

doubt as to which of several persons is the one properly chargeable with the offence committed, they should not all be charged, if by a more complete investigation the guilty party can be distinguished. Further, where superiors and inferiors have offended together, or superiors have sanctioned offences of subordinates,—whatever proceedings it may be thought proper to take against the latter, charges should certainly be preferred against the former, as primarily responsible and deserving punishment. So, where duties have been improperly performed by soldiers, by reason of their having been assigned to the same when drunk or otherwise unfitted to perform them, by superiors cognizant of their condition, it is the latter who, as primarily responsible for the consequences, should become subject to charges rather than the former.

Existing grounds of accusation to be presented together—Accumulation of Charges.—Not only should every charge be substantial, but care should be taken that all the charges and specifications to which the party may be subject be preferred together if practicable. Where all the charges to which an officer or soldier is amenable are known or can readily be ascertained, and the testimony to establish them is available—to bring one or a portion to trial separately, and the other or remainder to a further trial later—is an irregular and unmilitary proceeding.

What is known as the “*accumulation*” of Charges, which is the allowing of independent slight offences to pass apparently unnoticed, until a sufficient number have been committed to make up together, when stated in separate specifications, a show of grave misconduct in the aggregate, has been universally condemned, and the preferring of charges thus reserved has been com-

monly attributed to a hostile *animus*, to the serious disadvantage of the prosecution upon the trial.

By whom Charges are to be preferred.—A military charge, by whomsoever *initiated*, must, to serve as a proper basis for official action and trial, be *formally* preferred, *i.e.*, officially subscribed, by a commissioned officer of the army. Such a charge may *originate* either with the formal preferrer himself, or with any other individual, whether or not in the military or public service. A civilian, if first advised or personally cognizant of a serious offence, committed by an officer or soldier, may, as properly as any military person, bring the same to the knowledge of the military authorities, and, indeed, is but performing public duty in so doing. So, a charge may be advanced in the first instance by an enlisted man. But, although a civilian or a soldier may present the charge in writing and duly framed, the *formal* preferment of the same—the legal act—must be by and under the signature of an *officer*.

Any officer, of whatever rank, and whether or not exercising command, may legally prefer a charge and at any time. There is no military status which involves a legal disqualification to prefer charges; an officer, though himself under charges, in arrest, or under sentence, may not only originate but formally prefer a charge with the same *legal* effect as any other officer. But while any officer may legally thus act, the preferring of charges by certain officers is not favored. Thus charges by a junior against a senior in rank, unless ordered to be preferred or sanctioned by a common superior, are not encouraged in practice. In general charges will most appropriately be preferred either by the commanding officer of the accused, by a superior in rank, or by the judge advocate of the court; the latter

acting officially and by the direction express or implied of the convening authority.

To whom to be preferred.—Charges are to be preferred to the commander authorized to order the court. By *preferring to* is meant officially addressing and forwarding to the commander, through the proper military channels, the formal charges, with a request or recommendation that the same, if approved, be referred to a court-martial for trial. Such charges should be accompanied by the statement, in regard to enlistments, discharges, etc., required by par. 927, and by the evidence of previous convictions required by par. 929, A. R.*

Amendment of Charges.—Charges on being preferred to the proper commander are, where necessary, revised by him or by his staff judge advocate, and thus may be materially modified before they are completed and finally referred to the court for trial. But when so referred, they are, in contemplation of law, *ordered to be brought to trial as they stand*. Upon the trial, as will appear in a subsequent Chapter, the court may even strike out a defective charge or specification on motion of the accused, or, in lieu thereof, allow it to be amended; but, self-moved (or in the absence of an issue) and of its own original capacity, it has no power to amend, modify, discard or withdraw any material portion of the charges or specifications committed to it for trial. Nor has the judge advocate of the court any authority of himself to amend charges once committed to him for prosecution. He may, indeed, with the sanction of the court, correct some obvious misstatement as to a name, date, number, quantity, etc., but he can make no material substantial amendment without due authority therefor received from the convening commander.

Additional Charges.—This is a technical term in military law, meaning new charges which are ad-

* Amended in G. O. 79 of 1898.


vanced *after* the preferment and service of the particular charge or set of charges for the trial of which the court has been ordered or upon which the accused was originally intended to be arraigned. Such new charges may relate to past transactions which were not known by or brought to the attention of the officer framing or ordering the original charges, at the time these were preferred ; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest on the original charges. Thus, if, after such arrest, he commits a "breach of arrest," an "additional" charge will properly be added in the case., and served upon him. Charges of this class do not require a separate trial, but may and properly should be tried by the same court which tries the original charges, and at the same time. They must, however, be brought before the court prior to its being sworn. After the court has been duly sworn, as required by the 84th Article, to "try and determine the matter before it," further or "additional" Charges (or specifications) cannot legally be entertained by it at that trial, but must await a separate investigation.

The Service of Charges.—This consists in delivering personally to the accused a true copy of the charges and specifications upon which it is proposed to bring him to trial. The service is usually made by the judge-advocate of the court, the adjutant of the command, or other officer or non-commissioned officer detailed for the purpose. In a case of an accused soldier who is illiterate or imperfectly acquainted with the English language, the charges and specifications should be read and their contents explained to him by the officer making the service.

The law indicates no particular time within which charges should be served upon enlisted men, but, in the

case of officers, Article 71 of the Code in effect prescribes that, "except at remote military posts or stations," a copy of the charges shall be served "within eight days after the arrest." At "remote" posts, etc., the time is left indefinite; but in all cases, whether of officers or soldiers, the interests of justice and military discipline unite in requiring that charges should in general be served simultaneously with the arrest or as soon after arrest as is reasonably practicable.

If after the service of the original charges, and before arraignment, such charges have been, by competent authority, materially amended, there should properly be a re-service upon the accused, as soon as practicable, of the amended charges. And service should be similarly made of "additional" charges, if any are preferred.



CHAPTER IX.

ASSEMBLING AND OPENING OF THE COURT—THE
PRESIDENT AND MEMBERS.

The convening order.—As already shown, a general court-martial is constituted by a military order issued either by the Commander-in-chief or by one of the military commanders expressly authorized for the purpose by statute. In its usual form this order is a direction to certain officers named to assemble at a certain time and place, and form a court for the trial of a person or persons specifically or in general terms indicated, and to a further officer to act as judge advocate of such court. The original order may be supplemented or modified in any of its particulars by a subsequent order from the same source; but the court cannot of itself depart from the terms of the order. Thus a court would not be authorized to try an enlisted man under an order directing it to convene for the trial of an officer or officers.

Where, in the opinion of the convening authority, the exigencies of the service or other circumstances require that an exception be made to the general rule in regard to the hours of session prescribed in Article 94, it is added in the order that—"The court will sit without regard to hours." [See Chapter XIII.]

Where the convening order details officers stationed at posts, etc., other than the post or station at which the court is to be held, a certificate, required by an enactment of 1882, is now subjoined to the effect that—"The

travel involved in the execution of this order is necessary for the public service."

The meeting of the court.—Pursuant to the convening order (and the supplemental orders, if any), the officers named in the detail for the court assemble in full uniform,* at the time and place designated, in such building or room as may have been set apart for the purpose by the post, etc., commander or provided by the quartermaster. When five or more have arrived they may proceed to business: till five appear those present usually adjourn from day to day to await at least the minimum number.

A quorum of members being assembled they are brought to order by the senior as presiding officer, and, as the roll is called by the judge advocate, take their seats according to their relative rank alternately at the right and left of the president, in the manner of all judicial bodies. The judge advocate is commonly seated opposite the president, and seats are provided near him for the accused and his counsel (who are also properly furnished with table-room) and for the witnesses.

Opening of the court.—Such preliminary business as may be disposed of by the court before being sworn—as, for example, the settlement of a question of precedence between members—having been concluded, the accused is introduced and the court opened. Whether indeed a court-martial shall be *opened to the public* is a matter within its own discretion. It may decide to be thus open at one part of its proceedings and closed at another, or to be closed throughout. In general, however, courts-martial remain open from the beginning to the end of a trial except when cleared for deliberation. Spectators are allowed to be present when there is room for them, and so long as they conduct themselves in an orderly manner. Newspaper reporters are generally ad-

* But "undress uniform" may be worn when "rendered necessary by the state of the weather." G. O. 103 of 1890.

mitted, but, in a proper case, the court may vote not to permit its proceedings to be reported.

Introduction of the accused.—The accused appears before the court pursuant to previous notice or order, and, if he be a private soldier, under guard. Accused persons (if military) should be in uniform; officers and non-commissioned officers without their side arms or sashes. An accused should not be introduced with hands or feet fettered, and if he has been previously confined in irons these should be taken off before he is brought into the court-room, unless there be reasonable grounds for apprehending an attempt to escape or violence on his part, or an attempt at rescue. It is a principle as old as the common law that, except where such grounds exist, the prisoner at his arraignment should be free in all his limbs before the court, so that he may be in no manner hampered in making his defence.

Preliminary objections by accused.—The accused, having duly appeared before the court, may, before it is qualified and sworn, properly interpose any objection going to its legal existence or authority to proceed in the case. Thus he may object that the court has not been legally constituted or composed, or that it is without jurisdiction of his person. While an objection to the *jurisdiction* is more commonly made upon the arraignment, and in the form of a plea to the jurisdiction, or of a motion to strike out a charge or specification as not setting forth an offence cognizable by the court, the present stage is the more appropriate occasion for raising, arguing and passing upon exceptions to the court as *constituted or composed*, such exceptions being of a radical character. What objections of this class would be valid and final has already been indicated in the Chapter on the Constitution and Composition of General Courts. In time of peace, however, and in a

small regular army, preliminary objections of this nature are very unfrequent in practice.

Admission and status of counsel.—The accused, upon his introduction, will, if he desire it, properly apply to have a certain person (or certain persons) named—civil or military—admitted as his counsel. While the admission of counsel is not a right but a privilege only, it is a privilege which is almost invariably acceded to by the court. It is in fact never refused unless the counsel selected is a seriously objectionable individual—a rare contingency. Par. 926, A. R.,* now requires commanders of posts where general courts-martial are convened to detail, at the request of an accused, a “suitable officer” as his counsel, if practicable. Where the accused, though desiring counsel, has not yet been able to procure any or such as he prefers, the court, under the 93d Article of War (to be considered in a subsequent Chapter) will ordinarily grant a “*continuance*” or reasonable delay of the proceedings, to enable him to obtain such counsel. By a strict rule, formerly enforced, counsel were precluded from all oral communication; not being permitted to address the court, examine witnesses *viva voce*, or even read the concluding argument, but being required to express themselves on all occasions either through the accused or in writing. But this rule has now become very materially relaxed, and is seldom applied. Counsel before courts-martial are commonly allowed much the same privilege of oral expression as before the civil courts.

In important cases, counsel to assist the *judge advocate* have sometimes been admitted. More rarely counsel have been permitted to attend the *prosecuting witness*.

The president.—The senior in rank of the members present is always the president of the court. The 85th Article of War directs that he shall administer the

* Amended in G. O. 49 of 1898.

oath to the judge advocate, and pars. 919, 954, A. R., indicate in brief his other duties. He presides during all the proceedings, opens the court and calls it to order at each session, announces adjournments, preserves order and decorum, sees that the rights of all persons before the court who are entitled to consideration are respected, conducts the routine of each day's business, and in general acts as the organ of the court in declaring its decisions or other action, in the conveying of its directions to the judge advocate, and in the interchange of communications between the court and the convening commander. He exercises no *command* over the court or judge advocate, nor has he a casting vote. In deliberating and voting he merely acts as a member, —as the equal of the other members and no more. He is challengeable in the same manner and on the same grounds as any other member. At the conclusion of the proceedings he authenticates the record by his signature in connection with the judge advocate.

The members.—The special function of the members is to try and determine according to their oath, the specific obligations of which will be indicated in a subsequent chapter. Before being sworn, however, as well as after, they decide all questions and issues by a *majority vote* (except in the single instance of adjudging a death sentence, for which a two-thirds vote is required), and a majority of one is as effectual and final as a unanimous conclusion. A tie vote is no vote,—*i.e.*, a proposition upon which the vote is a tie is not carried. In voting, the members are required by Art. 95 to “begin with the youngest in commission.” Whatever differences of opinion may be exhibited by the voting, the members, in the results of their voting, must be and appear as a unit. The conclusion arrived at by the majority is the determination not of that majority but of

the court. All dissent is merged in the final result, and no protest is allowable.

A member who has absented himself from the court or a session is required, upon his appearance or return, to present to the court an excuse for or explanation of his absence. Where a member, who has been absent during the taking of testimony or other material proceeding, returns to his seat, such testimony, etc., should be read over to him from the record before he begins again to act upon the court. The same precaution should be taken where a new member is added to the court after the trial has commenced.

Members should not assume capacities incompatible with their official function. Thus, except to testify as to character, members are not to take the stand as witnesses if it can be avoided. Nor, where the judge advocate has been relieved or is absent, can a member properly be allowed to act as judge advocate.

In G. O. 9 of 1892, it is declared that—"Members of a court-martial, who are stationed at the place where it sits, are liable to duty with their command during the court's adjournment from day to day. Courts-martial will, as far as practicable, hold their sessions so as least to interfere with ordinary routine duties." [See par. 918, A. R.]

The members, in the words of Art. 87, "*are to behave with decency and calmness.*" Disorderly conduct or disrespectful language on the part of a member will subject him to charges and trial.

CHAPTER X.

THE JUDGE ADVOCATE.

The existing law on the subject.—The statutes which relate to the appointment, duties, powers, etc., of judge advocates of American courts-martial are the 74th, 84th, 85th, 90th and 113d of the Articles of War, Secs. 1202 and 1203 Revised Statutes, and the Act of July 27th, 1892, c. 272. Some of the details of their employment are regulated by pars. 921–924, 954, 955, 958, 959, and 961 of the Army Regulations. Their function, however, is to a considerable extent determined by the usages of the service.

The subject of this chapter will be considered under the heads of—1. The appointment of the judge advocate; 2. His authority and duties.

His appointment.—It is provided in Art. 74 that—“*officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same.*” This important official is therefore appointed by the commander who convenes the court, being almost invariably detailed by him in the original convening order. A court-martial is in no case empowered to appoint a judge advocate for itself. If the judge advocate is prevented by sickness or otherwise from attending, the court must adjourn to await his reappearance or the detailing by the commander of a new judge advocate. Any officer of the line or the staff is legally eligible to

appointment as judge advocate and may properly be appointed if personally qualified.

Of the personal qualifications of an officer for the position of judge advocate, the principal are—1. Fitness, *i.e.*, a proper training and aptitude for the office; 2. Absence of bias, *i.e.*, an absence of any such prejudice for or against the accused as may materially affect the efficient, fair or courteous performance of his functions.

His authority and duties—1. *Prior to the trial.*—It is the duty of the judge advocate, before the meeting of the court for the trial, to serve upon the accused (if not already furnished therewith), a copy of the charges and of the convening order, to notify him of the time and place of the meeting of the court and obtain from him the names of the witnesses whom he desires summoned, to summon (or cause to be summoned by application through the proper channels) the material witnesses, to personally confer with the witnesses—at least those of the prosecution—when accessible, to procure the written evidence required to be used on the trial, and otherwise to prepare duly to prosecute—as by consulting the necessary legal authorities, etc. It will also in general devolve upon him to make requisition upon the quartermaster for a court-room and furniture (if the same be not already provided) and for the requisite stationery; also to secure a clerk, an orderly or orderlies and an interpreter where necessary. By Sec. 1203, R. S., he is authorized to appoint a *short-hand* reporter for the court; and as the employment of such a reporter greatly facilitates the prompt dispatch of business, one is generally obtained in cases of sufficient importance to justify the expense.*

2. *At the trial.*—Here the judge advocate sustains the capacities of prosecutor, adviser to the court and recorder.

As *prosecutor*, representing as he does the United

* An enlisted man may be appointed. (Circ. 22 of 1898.)

States, he is authorized (in the absence of special instructions on the subject from the convening officer) to conduct the prosecution in such mode, or upon such plan, as may appear to himself most advantageous. He is not empowered, however, of his own authority, to enter a *nolle prosequi* as to any charge or specification (*i.e.*, to withdraw it), or, as has been seen, to materially amend or alter it. In the testimony which he introduces, it is incumbent upon him (especially where the accused is without counsel) to lay before the court the full particulars of the offences charged and not merely those tending to prove guilt. He should consider himself not simply as a prosecutor but also as a *minister of justice*, whose duty is not so much to convict as to ascertain the truth. While, therefore, faithfully presenting the case of the government, he should facilitate the accused in making such defence, or offering such matter of extenuation as may exist in the case.

As *adviser to the court*, it is his duty to point out any violation of law that may be involved in the proceedings, and also to furnish to the court his opinion on any question of law arising in the course of the trial, when the same is required of him. By the Act of July 27, 1892, it is provided—"That whenever a court-martial shall sit in *closed session*, the judge-advocate shall withdraw, and when his legal advice or his assistance in referring to recorded evidence is required, it shall be obtained in open court." The proceedings of such a session should, on the reopening of the court, be at once communicated by it to the judge advocate, to be duly recorded.

As *recorder*.—In this capacity, it is the duty of the judge advocate to note and report (or cause to be noted and reported) in writing the entire proceedings of the court, both those had upon the trial and those prelimi-

nary or incidental thereto. If assisted here by a clerk or stenographer, he should carefully supervise the work of the latter. The findings, and the sentence (if any), as imparted to him by the court, he must enter in the record with his own hand. He need not preserve the written paper votes of the members given upon the findings or sentence, since these are no part of the record.

The record.—The Army Regulations (par. 954) require that the court “shall keep a complete and accurate record of its proceedings,” which should be clearly and legibly written. The duty of the judge advocate in connection with the preparing of the record is ministerial only: the record is the act and record of the court, and the court is responsible for its contents. Each record must be an entirety, and must fully set forth all the proceedings in the particular case. No matter how many cases may be tried by the same court, the proceedings of each case must be recorded independently, and as if it were the only case tried. Pars. 954-5, A. R., direct in effect that separate proceedings shall be prepared in each case.

As to the *details* of the record—it should exhibit, first, copies of the Order or Orders convening the court, detailing the members and judge advocate, relieving or adding members, changing the time or place of session, etc. It should state the original assembling of the court, and all subsequent assemblings, as also all adjournments and continuances. It should set forth, in order, the challenges if any, and the proceedings had thereon, the swearing of the members, the arraignment, charges, pleas (with special pleas or motions if any), the full testimony in the words as nearly as possible of the witnesses (and as given in the presence of the accused), with the depositions and documentary evidence if any (these latter being, preferably, annexed as exhibits), the closing arguments or statements, the findings, and the sentence in case of conviction, with the recom-

mendation, if any, of the members. It should also embrace any proceedings which may be had by the court upon a revision for the purpose of correcting errors. It should further, in compliance with par. 954, A. R., be authenticated at the end by the signatures of the president and judge advocate.

Appearing thus complete and accurate in its substantial details, the record will be *presumed* to be true and sufficient in law, and the proceedings recorded to be regular and legal. Though some formality or formalities may not be fully set forth, yet if no *statutory* requirement has been disregarded, the validity of the proceedings will not in general be impaired.

Forms for records of general and inferior courts-martial are set forth in the Appendix.

Other powers and duties at or in connection with the trial.—By Sec. 1202, R. S., the judge advocate is empowered to “*issue process to compel witnesses to appear and testify.*” This is further described as process “*like*” that issued by the criminal courts of the State, Territory, etc., in which the court-martial is held, and will therefore properly be assimilated to the ordinary writ of attachment of a witness. A form for this process is given in the Appendix. To authorize its issue, the witness must first have been duly served with a summons and have failed to obey it. The attachment is commonly forwarded, with the proper evidence of such service and failure, to the Department Headquarters or to the War Department, where the necessary orders are given for its service and enforcement. In practice it has been but rarely resorted to and only in cases of civilian witnesses.

By the oath prescribed by the 85th Article of War, which he takes upon the organization of the court, the judge advocate binds himself not to *disclose the vote or opinion of any member*, unless required to give evidence

thereof in a court of law, as also not to *divulge the sentence* of the court to any but the proper superior. The spirit of the oath would further preclude him from disclosing any *other* material proceeding of the court had in secret session and imparted to him officially. Thus he could not properly divulge an *acquittal*, before the reviewing authority had passed upon the same.

By the Act of July 27, 1892, judge advocates of all courts-martial (as well as of departments) are now "authorized to administer oaths for the purposes of the administration of military justice," and "for other purposes of military administration." *

3. *After the trial and completion of the proceedings.*— Besides filling out and signing the proper blank certificates for witnesses, clerks, reporters, etc. (who have not previously been paid), in order to enable them to receive their fees or compensation, the only official duty devolving upon the judge advocate, after he has authenticated, with the president, the completed proceedings, is to forward the record to the proper reviewing authority. Where the court was convened by the President, the record is to be transmitted by the judge advocate directly to the Judge Advocate General at Washington. Where it was convened by a military commander—as the General of the Army, a Division or Department commander or the Superintendent of the Military Academy—the record is to be forwarded directly to such commander as being the authority empowered to act, primarily at least, upon the proceedings. If the record is one of a regimental or garrison court it should be transmitted directly to the proper commander indicated by the 81st or 82d Article. A judge advocate is amenable to trial for neglect of duty in unreasonably delaying to forward a record.

* See G. O. 20 of 1894, amending par. 771, A. R., as to the administration of oaths.

CHAPTER XL

CHALLENGES.

IN a previous Chapter we left the Court ready to proceed to be organized for the trial, subject to such objections, or challenges, as might properly be taken to the members. To this stage we now recur.

The written law on the subject of challenges.—The only statutory law relating to the matter of challenges is the 88th Article of War, which is as follows: "*Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.*" The Army Regulations of 1889, par. 1037, directed that the record of the court should show that previously to the swearing of the court the accused "was asked if he wished to object to any member, and his answer to such question."

The Article construed and considered.—"*Members.*"—The Article makes only "members" challengeable. The judge advocate is therefore not subject to challenge. The term "members" includes not only the original members, but any such as may subsequently be added to the court. As to *all* members who come, under whatever circumstances, to act upon the court, the accused has the same right, and should be offered the same opportunity, of objection under the Article.

"*Of a court-martial.*"—This term includes regimental and garrison, as well as general, courts-martial.

It does not, strictly, include a court of inquiry or a military commission. It has become the *usage*, however, to allow challenges to the members of these bodies also.

"May be challenged by a prisoner."—In strictness the word "prisoner" confines the right of challenge to the accused. By usage, however, the right is also extended to the judge advocate, though much less frequently exercised by him than by the accused.

"Only for cause stated to the court."—This provision excludes what are known in law as "peremptory" challenges—*i.e.*, challenges preferred without any reasons assigned therefor. A "cause stated" is, properly, not merely a general statement or assertion, as that the member is prejudiced, biased, etc. The facts and circumstances in which the alleged prejudice, etc., is deemed to consist should in each case be set forth, to fully meet the requirement of the Article. The objection should be specific or as much so as the challenger can reasonably make it.

"The court shall not receive a challenge to more than one member at a time."—That is to say, challenges to the *array*—(*i.e.*, to the court, or members collectively)—shall not be entertained. Thus, objections which go to the jurisdiction, constitution, composition, etc., of the court *as a body* cannot be entertained by a court-martial *as challenges* under the present Article. Nor though the accused may deem all the members to be prejudiced or otherwise personally subject to exception, and though his grounds of objection may be the same to each member, he cannot include them all in a general challenge, but is permitted to challenge them singly only. He may indeed challenge all in succession if he see fit, and in whatever order he may prefer, but the court will only receive and pass upon a challenge to

one member at a time, not entertaining a further objection till that previously offered has been determined.

Where a party has several different grounds of objection to one member, the better practice is for the court to require that they be offered separately.

Procedure under the Article.—*When challenges may be offered.*—The appropriate occasion for the interposing of challenges is when the judge advocate reads to the accused the order or orders detailing the members, and, in accordance with the regulation above-cited, formally asks him if he wishes to object to any member. He must then present such objections as he knows or believes to exist, if he desires to take advantage of the same. If at this time he fails to present such objections, he is held to have *waived* them, and cannot be allowed to interpose them at any subsequent stage. If, however, a valid objection first comes to his knowledge at a later period of the trial, of the existence of which he could not by reasonable diligence have been informed before, he may then present it.

Form of presenting challenges.—The challenge may be presented in writing or orally. It should set forth a substantial ground and be expressed in respectful terms. If clearly frivolous or disrespectful the court may refuse to receive it.

Response by challenged member.—The member objected to is not required to respond to the challenge. If he does so, he will, commonly, either admit the imputation or disclaim it altogether, or make some explanation which will perhaps satisfy the challenging party and induce his withdrawal of the objection.

Trial of the challenge.—In the absence of such explanation, withdrawal, etc., the court proceeds to try the challenge as a separate issue, the challenging party

introducing if necessary, and subject to cross-examination, such evidence as may be pertinent. He may, if deemed desirable, subject the challenged member to an examination by interrogatories. The other party (*i.e.*, the judge advocate if the accused is the challenger, and *vice versa*) may then admit the challenge to be valid, or he may contest it, offering, if he sees fit, evidence to disprove the facts claimed by the challenger to exist.

Deliberation by the court.—If the challenge is manifestly valid, the court may sustain the objection without clearing; otherwise, it clears for deliberation, the challenged member properly retiring. The judge advocate, as well as the accused, withdraws. In deliberating, it will be for the court to inquire, *first*, whether the ground of objection advanced is a valid one; *secondly*, whether its existence in the particular case is established. What are valid grounds of challenge at military law will be considered presently. As to the question of the sufficiency of the proof, the court will properly bear in mind two principles: 1, that the burden of maintaining the challenge, and establishing that the member does not stand indifferent, rests upon the challenging party; 2, that where any reasonable doubt exists as to the impartiality or indifference of the member in the case to be tried, it will be safer and in the interests of justice to sustain the objection and excuse him.

Determination of the challenge.—The validity of the objection is, like all other issues, determined by a majority vote, the question to be voted upon being “shall the challenge be allowed as valid?” In the absence of a majority vote in the affirmative, the challenge is not allowed. A tie vote is not sufficient to sustain it.

Procedure upon a decision.—The court having come to a conclusion upon the cause of challenge assigned, the doors (if they have been closed) are opened, and, the

parties and the member who had retired being present, the decision is announced by the president. If it be that the challenge is not sustained, the member retakes his seat and the proceedings continue in the regular course. If the reverse is the result, and the member is, as it is commonly phrased, "excused," he withdraws permanently; whereupon the court, if five members still remain, goes on with its business. If the sustaining of the challenge has reduced the number to four, the court, since it cannot legally proceed, adjourns and reports the fact through its president to the convening authority. The latter will thereupon usually detail a new member (or members), who—as previously remarked—will be subject to challenge in the same manner as the original members.

It may here be noted that, whatever may be the ground advanced, a court-martial is never authorized to excuse a member at his own request or in the absence of a challenge.

The Grounds of challenge.—The principal grounds of challenge in the military law and practice are the following:

1. *Opinion formed or expressed.*—The opinion, to constitute valid cause, must be on the merits of the case—that is to say, on the question of guilt or innocence. A decided opinion *expressed* necessarily disqualifies; but it is not essential that the opinion should have been expressed, provided it be fully formed in the mind. It need not then proceed from ill-will, but may be honestly entertained. It must also be a decided opinion—not a mere transient impression or hypothetical view. If not absolutely positive, the test which has been applied to it in the civil courts is, whether it be so fixed as to require evidence to remove it. If it be such, the safer course is to hold that it constitutes a valid objection.

2. *Personal prejudice or hostility*.—This ground of challenge is sustained by proof of language or conduct on the part of the member evincing a decidedly unfavorable estimate of the accused, or decided bias against him. Thus it was held good cause of exception to a member that he had applied contemptuous and degrading epithets to the accused (a soldier) on the occasion of his arrest. So, a decided expression of opinion by a member as to the unfitness of the accused (an officer) for any official position was held to charge him with sufficient prejudice to constitute ground of challenge. Prejudice may also be implied from the relation of the member toward the subject-matter of the charge, as where the violence or other misconduct for which the accused is to be tried was aimed at the member himself or resulted to his injury. So, decided personal animosity, from whatever cause arising, exhibited or entertained toward the accused by a member, has always been held to constitute abundant ground of challenge, unless the hostile feeling has wholly ceased to exist prior to the trial.

3. *Having preferred the charges*.—This is valid ground provided the member has acted, not ministerially under the orders of a superior, but as the actual accuser. In such case indeed the preferring is but an instance of the expression of an opinion upon the merits. The objection is still stronger where the offence charged is one which was committed against the preferrer himself.

4. *Being a material witness*.—The mere fact that a member of the court is a material witness in the case is not *per se* sufficient to exclude him on challenge. Thus he may be called to testify as to character, or as to some interlocutory matter of inferior importance, without affecting his capacity to act impartially on the trial. But where, having knowledge of the merits of the case, he has been summoned, or is to be used, as a material

witness to the same, it will in general be safer to "excuse" him if objected to on this ground.

5. *Interest—Having a right to promotion.*—A member of a court-martial, like a juror, is properly challengeable if he has a direct personal interest in the fact or question involved or to be decided—*i.e.*, if any reasonably certain substantial advantage or detriment may result to him from the event of the proceeding. The ground of interest, however, has rarely been urged upon military trials, except where objection has been taken by an accused officer to a member on the ground that he would be entitled to *promotion by seniority* if the accused were dismissed the service as the result of the sentence of the court. This objection is especially apposite in cases where a sentence of dismissal is mandatory upon a conviction of the offence charged.

That a member will by the dismissal of the accused be merely advanced one "file" or number in the line of seniority toward promotion, will in the majority of cases be too remote an interest to form a valid objection. Cases, however, may occur in which such interest is not thus remote, and the court may in its discretion properly sustain the exception—as where the number to which the member will be advanced is the *first* in the line of promotion to a higher grade; or where it is the *second*, and the senior officer at the head of the list is soon to be retired, or, by reason of the compulsory retirement of a common senior or otherwise, to be promoted.

6. *Intimate personal relations.*—This is not a frequent ground of objection in the military practice. Where, indeed, a member of a military court is *in fact* subject to be biased by any intimate friendly, social, or other personal relation binding him to the accused, he should be set aside upon the challenge of the judge advocate

with the same reason that a member subject to be biased by a hostility entertained towards the accused should be set aside upon an objection interposed by the latter.

7. *Having taken part in a former trial or inquiry.*—

This ground of challenge, which is but another aspect of the general subject of challenge for *opinion*, may be presented on four different occasions, as follows: (1.)

Participation in a former trial of the same case.—A member of a court-martial who has taken part in a former trial (*i.e.*, an investigation which has resulted in a finding) of the same case, will necessarily be excluded on challenge. Where, however, the former proceedings were terminated before a finding was reached, the member will properly be excluded only when it appears that the effect of such proceedings has been to bias his judgment.

(2.) *Participation in a former trial of a different case involving the same or a similar question.*—This, in military as in civil cases, is or is not a sufficient objection, according to circumstances. While it is not *per se* valid ground of challenge to a member that he has taken part in a previous trial of the accused for a similar offence, or in a trial for the same offence of another officer or soldier between whom and the present accused there has been criminal concert or combination, yet if the previous hearing has induced the formation of an opinion as to the guilt or innocence of such accused, the member is of course properly subject to exception. (3.) *Having been a member of a previous court of inquiry which investigated the charges to be tried.*—In the practice of American courts-martial this has invariably been regarded as valid cause for challenge; the challenged member being subject to objection in the same manner as is a member of a petit jury who was a member of the grand jury which found the indictment. (4.) *Having served on a regimental court from which an appeal is taken.*—It is settled

law that in the case of an appeal, under the provisions of the 30th Article of War, from a regimental to a general court, a member who has acted on the former court will necessarily be excluded from the latter upon challenge. This for the reason that the regimental court, in every such case, has not only formed but expressed a specific opinion and conclusion. The Article here referred to will be considered in a subsequent Chapter.

CHAPTER XII.

ORGANIZATION, ARRAIGNMENT, PLEAS AND MOTIONS.

THE ORGANIZATION.

The swearing of the court.—The accused (and judge advocate) having fully exercised, or been afforded an opportunity to exercise, the right of challenge, the members (if at least five in number) proceed to complete their organization as a court, for the trial, by formally qualifying themselves as prescribed in the 84th Article of War, which is as follows:

“The judge advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: ‘You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial

unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you, God.' "

This oath must be administered and taken before proceeding upon "any trial"—*i.e.*, before each separate trial. Swearing a court generally at the outset for all the cases to be tried by it is not a compliance with the Article, and is legally insufficient.

The *form* of administering the oath is as follows: The members and the judge advocate having risen in their places, the latter reads aloud the form, prefacing it by addressing the members by name and rank as given in the convening order, as follows—"You, A. B., Colonel, etc., C. D., Major, etc., E. F., Captain, etc. (and so on), do severally swear that you will well and truly try and determine," etc.; each member properly keeping his right hand raised during the reading, or assenting at the end by an inclination of the head.

A member not present at the organization, but taking his seat later in the day or on another day, must be then separately sworn; and so must a member subsequently added to the court by the convening authority.

As authorized by Sec. 1, R. S., any member who objects to be sworn, may be *affirmed*; the word "affirm" in the place of "swear" being used in addressing him, as his name occurs in the order of rank, thus: "You, A. B., C. D., etc., do severally swear, and you, E. F., do affirm, etc." A member—like a witness (as indicated in Chapter XIII)—may be allowed to accompany the ceremony of the oath by any form not inconsistent with the directions of the Article by which the oath may in his estimate be rendered more obligatory as to himself.

The oath of the *judge advocate*, prescribed by Art. 85, and taken after the administration of the oath to the members, has already been referred to.

Obligation of members' oath.—The engagements which a member assumes in being sworn are:

1. *To "try and determine according to evidence."*—Here the member binds himself not to be influenced by any private knowledge or extraneous information which he may have in regard to the case, but to decide it by the testimony, oral and written, which may be duly laid before the court:

2. *To try, etc., "the matter now before" the court.*—The members, therefore, as has already been pointed out, cannot, after being sworn, legally entertain new or additional charges or specifications setting forth offences other than those "before" them at the organization:

3. *"To duly administer justice without partiality, favor, or affection."*—This is the obligation, express or implied, of all judges, and secures, or should secure, for the accused, however grave the charges, a perfectly fair trial and full opportunity to make defence:

4. *To administer justice, etc., "according to "the Articles of War."*—The member here undertakes to administer justice, not according to his own private views of justice or his personal opinion as to what the law should be, but in strict compliance with the actual statutory provisions of the military code relating to the offence or offences charged:

5. *In case of doubt, to administer justice according to his conscience, best understanding, and the custom of war.*—In certain cases the Articles of War fail fully to define the offence made punishable, and in most cases do not prescribe a particular sentence to be imposed in any event, but leave the punishment in a measure to the discretion of the court. In such cases of "doubt," the member will be guided by his "conscience"—(i.e., his moral sense, or natural feeling of justice), and his "best understanding" (or intellectual faculty)—in de-

termining whether the accused was actuated by the guilty *animus* essential to the offence charged, and in estimating the amount of criminality involved in the act and thus the measure of punishment adequate thereto. He will also, where necessary or appropriate, recur to the custom of war or military usage, as indicating whether certain acts are to be considered as constituting a certain offence, whether a certain defence is to be regarded as valid and sufficient, whether a particular punishment is or not sanctioned by the practice of the service, etc.:

6. *Not to divulge the sentence before it is duly published, or disclose the vote or opinion of any member, unless required to do so as a witness before a court of justice in a due course of law.*—The few violations of this obligation which have occurred in practice have consisted mainly in statements made in the record of the court; as a statement, for instance, that the vote was unanimous, or that all the members concurred in the finding or sentence, or in a vote on a single charge or specification. It is as much a violation of this engagement for a member to disclose his own vote as to disclose the vote of another member. The disclosure of the vote or opinion of a member or members upon any material *interlocutory question*, raised during the trial and passed upon by the court when cleared for deliberation, would also be a substantial violation of the obligation assumed by this clause of the oath.

While the members, by this clause, are precluded from divulging the *sentence* only, it is clear that a member could not properly divulge the fact of an *acquittal*. Such a disclosure would not indeed be a violation of the *oath*, but, as indicated in considering the obligation of the judge advocate under the 85th Article, it would be a breach of official trust and duty, and would constitute

an offence under Art. 62. By the term "court of justice," as employed in connection with the words—"in a due course of law," was evidently intended a civil or criminal court of the United States, or of a State, etc.

Upon the taking of the oath by the members, the court is *duly organized* for the trial, and the presiding officer may, properly, make formal announcement to that effect.

THE ARRAIGNMENT.

Form of arraignment.—The next proceeding is the formal arraignment of the accused. Arraignment is the calling upon the accused to answer to the charges upon which he is to be tried. In the practice of courts-martial it consists in first reading to the accused all the charges and specifications, and then demanding of him whether he is guilty or not guilty of each, separately and in order. The order pursued, where there are several charges, is to arraign first on the 1st, 2d, and succeeding specifications of the First charge, and then on that charge; next on the separate specifications of the Second charge, and then on that charge; and so with the rest. In our practice the arraignment is conducted by the judge advocate, both he and the accused properly standing during the ceremony. Where two or more prisoners are to be tried together on joint charges, each is separately arraigned.

If the charges are numerous or elaborate, and the accused is fully acquainted with their contents, he may, with the consent of the court, waive their reading, and state his plea or pleas in brief, without a resort to the specific questions and answers indicated; the ceremony of arraignment being thus simplified.

Standing mute.—The accused may indeed refuse to plead or answer at all to the arraignment, or—in legal phrase—may “stand mute.” Contingencies of this sort are provided for in the 89th Article of War, as follows: “*When a prisoner arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty.*”

On such occasion as that described in the Article, the court may be of opinion that the conduct of the accused proceeds not from “obstinacy” or “deliberate design” but from insanity or defective intelligence. In such a case it should suspend the proceedings and report the facts to the convening authority, for such action as he may think proper to take or to recommend to be taken by the Secretary of War—as, for example, a discharge from the service, or a committal to the Government Hospital for the Insane. If the refusal to plead be accompanied by menace or disorder, the court may be justified in proceeding under Art. 86.

PLEAS.

Plea of Guilty or Not Guilty.—The usual response to the arraignment is a plea of guilty or not guilty, or guilty to some of the charges or specifications and not guilty to others. In this plea also the accused may *except* a part of the allegations. Thus he may plead guilty to a specification except as to some averment or averments of fact, or as to a word or words expressive of the intent charged, and to this or these not guilty; or he may plead not guilty to a specification except as to some portion which is admitted, and to this portion guilty. So, this plea may be similarly qualified

if the accused be charged with a specific offence which involves and contains a certain lesser offence. Thus, if charged with desertion, he may plead guilty to the specification except as to such words or allegations as impute desertion (*substituting* if necessary words describing the lesser offence), and to the charge not guilty, but guilty of absence without leave.

The accused may plead guilty of the specification but not guilty of the charge. But the converse plea of not guilty of the specification (or specifications) but guilty of the charge is incongruous and wholly inadmissible.

The plea to a charge or specification of "*guilty but without criminality*," though sometimes admitted in practice, is irregular and contradictory and not to be favored. It is practically equivalent to "not guilty," and should properly be made in this form.

An accused who has pleaded not guilty may be permitted by the court to withdraw his plea and substitute the plea of guilty, and also *vice versa*.

A plea of guilty, though a confession, does not necessarily shut out testimony. Where required for determining the actual criminality of the offender and the proportionate measure of punishment which should be imposed and executed, evidence of the circumstances of the offence will properly be taken by the court, notwithstanding such plea.

The effect of the plea of guilty or not guilty is to *wave* any defects of *form* in the charges or specifications. A *substantial* defect, however, going to the sufficiency of the charge as a statement of a military offence, is not waived. Nor, of course, can any such radical defect as an illegality in the constitution of the court, or an absence of jurisdiction of the offence or the person, be done away with or lessened by this plea.

Special Pleas.—The special pleas, or, as they are sometimes termed, *pleas in bar*, in contradistinction to the plea of not guilty (which is known as the plea of the *general issue*), are the following, viz.: The Plea to the Jurisdiction; the Plea of the Statute of Limitations; the Plea of Former Trial for the same offence; and the Plea of Pardon.

The Plea to the Jurisdiction.—This is a special plea, most appositely made upon the arraignment, to the effect either that the *person* of the accused, or the *offence* charged, is not within the jurisdiction of the court. That this plea is one which may legally be made and entertained is now fully settled in our military law. In other words, a court-martial is authorized to pass upon the question of its own authority to proceed to try under the convening order, although its conclusion—here as elsewhere—is, of course, subject to the approval or disapproval of the convening authority.

This form of special plea, however, need not here be dwelt upon. In Chapter VI., under the title of the Jurisdiction of General Courts-martial, have already been fully exhibited the occasions and grounds for such plea in general, and in Chapter XVIII. are indicated the special grounds upon which the same may be offered upon a trial before an inferior court. The situations and circumstances, therefore, which justify this plea need not here be reiterated.

The Plea of the Statute of Limitations.—*Art. 103.*—The military statute of limitations—*i.e.*, the statute which limits the time within which a military offender may be made liable to trial and punishment, is, as already indicated in Chapter VI., the 103d Article of war, as amended and added to by the Act of April 11, 1890. The original Article is as follows: “*No person shall be liable to be tried and punished by a general court-*

martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

The following is the amendment, relating to desertion only—"No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offence, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided, That said limitation shall not begin until the end of the term for which said person was mustered into the service.*" In general, therefore, when an accused is brought to trial for an offence committed more than two years before the date of the order convening the court, or, in a case of desertion in time of peace, more than two years after the end of his term of enlistment, he may specially plead that the statutory limitation has taken effect in his case and that he is not amenable to trial. The claim that the limitation has taken effect may also be availed of as a matter of defence under the general plea of not guilty.

Exceptions in the Article.—The original Article excepts from the limitation those cases in which, either "by reason of having absented himself," or by reason of "some other manifest impediment," the offender "shall not have been amenable to justice" within the period of the two years. The *absence* here indicated has been defined by a United States Court as being "such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of military courts—that is, absence

from the United States, *i.e.* the same absence as that specified in the *Amendment*. The term "other manifest impediment," as defined by the same Court, refers to such conditions as the being held as a prisoner of war in the hands of the enemy, or the being imprisoned under the sentence of a civil court upon conviction of crime,—during the whole or a portion of the period of limitation. The *status*, to constitute an "impediment" in the sense of the Article, must be one which precludes the military authorities from subjecting the party to the military jurisdiction. Absenting himself from the United States being the sole impediment recognized in the Amendment, the mere fact that a soldier, upon deserting, has enlisted in the Navy or Marine Corps, will not constitute such an impediment, because, while so enlisted, he is present within the jurisdiction of the United States, and within the reach of the military authorities. So, the mere fact that such authorities do not know, and cannot for the time ascertain, where the deserter is, will not constitute an impediment. Nor will a concealment of himself or of his identity by the deserter, or other fraud practised by him, have such effect.

Proof.—This plea or defence may be supported by the designation of the date of the commission of the offence, or of the period of enlistment, as it appears in the specification, or, if such date or period does not clearly or correctly appear therein, by evidence establishing it. The period of the limitation being thus shown, by comparison with the date of the order for the trial or the date of the arraignment, to have elapsed, it will devolve upon the prosecution to prove the existence of an absence or impediment excepting the case from the application of the Article. On failure of such proof the plea, or defence, must be held sufficient by the court.

The Plea of Former Trial for the same offence.—This is the special plea by which an accused party avails himself of the principle incorporated in the 102d Article of the military code, viz.: “*No person shall be tried a second time for the same offence.*”

Meaning of tried.—This Article has a meaning similar to that of the clause in the Constitution providing that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb.” The terms “put in jeopardy” and “tried” have substantially the same signification—viz., prosecuted to a conviction or acquittal. Whether or not a sentence has been adjudged is immaterial, and it is also immaterial whether or not the finding has been approved or acted upon. A person, therefore, has been *tried*, in the sense of the Article, when he has been duly found guilty or not guilty by a competent court-martial. When thus once found, should he be again arraigned for the same offence, he may effectually plead a former trial in bar of the second. It is otherwise, however, if the first proceeding did not reach an acquittal or conviction, but was for any cause interrupted and discontinued; or if the court, though coming to a finding, was in fact without jurisdiction; or its proceedings were for other reason legally invalid. “Tried” means not only fully, but legally tried.

Meaning of “same offence.”—Further, to sustain the plea, the two offences, the one proposed to be tried and the one previously tried, must be the *same* in law—i.e., must be either—(1) substantially identical; or (2) so related, from the fact that one is included and involved in the other, that a conviction or acquittal of the one must necessarily convict or acquit of the other. Thus a conviction or acquittal of a desertion will be a bar to a subsequent prosecution for the offence of absence without leave included in such desertion. So an acquittal or conviction of murder or of robbery will be a

bar to a subsequent prosecution for the manslaughter involved in the former crime, or the larceny involved in the latter.

But a trial and conviction in a civil court of a civil offence is not a bar to a prosecution before a court-martial for a military offence involved in the same act, since the two offences are not "*same*," but distinct in law, and the accused is amenable to trial for both; a previous conviction of either not affecting the legality of bringing him to trial for the other.

Proof.—To support this plea, the accused must produce, or prove the existence of, the *record* of a former legal conviction or acquittal—unless indeed its existence be admitted by the prosecution. The record of a military trial is commonly proved by a copy of the original (as filed in the Judge Advocate General's Department, or—if a record of an inferior court—at the Headquarters of the military Department), authenticated by the legal custodian in the form usually practised for the purpose. Records of criminal courts of the United States, or of the States or Territories, are proved by copies authenticated in the manner and form indicated in Chapter XIV., on Evidence.

Waiver.—The right to plead a former trial, being for the sole benefit of the accused, may be *waived* by him. A neglect to interpose this plea on the second arraignment will be such waiver; as also will be an application by the accused for a second trial after the result of the first is made known.

The Plea of pardon.—A pardon is an act of grace and mercy presupposing only the commission of an offence. An offender may therefore be pardoned without having been tried or convicted. When so pardoned, he may effectually plead the pardon if subsequently brought to trial for the offence. Occasions, however, of such pardons, and, accordingly, of such

plea, are rare. The more common instances in our service have been those of deserters or absentees claiming to have been included in an amnesty, or general pardon of such offenders, offered by the President. Pardons, as is well settled, may be *conditional*, *i.e.*, based upon a condition or conditions precedent or subsequent; and these amnesties have generally proceeded upon the condition precedent that the party shall return and surrender himself by a certain day, while some of them have contained the condition subsequent that he shall duly perform duty for the remainder of his term, or make good the time lost by his absence, etc. A plea, therefore, of such a pardon should be accompanied by evidence that the party has duly and fully performed the condition, or has performed it as far as practicable up to the date of the plea.

What is known as *constructive* pardon—*i.e.*, action not in the form of pardon but having that effect—has sometimes furnished occasion for this plea. Thus, where a deserter has been restored to duty without trial, under par. 132, A. R., “by the authority competent to order his trial,” this action is regarded as a constructive condonation of the offence, and may be pleaded in bar of a trial subsequently ordered.

The subject of *pardon* will be more fully considered in Chapter XVII.

Procedure upon special plea.—If a special plea interposed by the accused be sustained by the evidence and allowed by the court, the proceedings are, for the time at least, terminated, and the court adjourns, the record of its action being forthwith transmitted to the reviewing authority. He, indeed, may disapprove and order the court to proceed with the trial. Such an order, however, will be exceptional: the commander, though he may not approve the ruling, will rarely deem it expedient to undo the action taken.

If the plea be disallowed by the court, the accused is called upon to plead guilty or not guilty and the trial proceeds on the merits.

MOTIONS.

Upon the arraignment and before his plea or pleas, or in connection therewith, the accused will properly make such *motion* as he may desire to present. The motion, if any, which is interposed at this stage, is commonly a Motion to Strike out, or a Motion for Continuance.

Motion to strike out.—This is a summary and convenient form, especially useful and apposite where the charges or specifications are many, and by means of which a defect in the pleadings may be removed at the outset and the proceedings materially simplified. It is in substance a proposition or request to the court to have stricken out a particular charge or specification, or part of one, on the ground either that the alleged offence or offender is not within the jurisdiction of the court, or that the charge or specification does not set forth a legal offence, or that the one or the other is so indefinite that the accused cannot make a proper plea or defence thereto, or contains foreign matter to which he ought not to be required to respond, or is otherwise materially defective. It thus answers the purpose of a plea to the jurisdiction, as well as of the demurrer and the plea in abatement of the civil practice. It will generally be decided summarily by the court, though, if evidence be required to sustain it, the same will be allowed to be introduced as on the trial of any other issue. If the specification or charge in question is not so defective but that it is capable of amendment, the court, in granting this motion, will sometimes permit the judge advocate to amend rather than eliminate the pleading altogether.

Motion for continuance.—It is also at the arraignment that a “continuance,” or postponement for a certain time of the proceedings, will regularly be moved for, though the same may also legally and often appropriately be asked at a later stage. The subject of continuances is regulated by Art. 93, as follows: “*A court-martial shall, for reasonable cause, grant a continuance to either party for such a time and as often as may appear to be just: Provided, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.*”

A motion for continuance is most frequently based upon one of the following grounds—*viz.*: 1. Absence of a material witness; in which case the party moving will regularly (or unless the proceeding be waived by the other party with the consent of the court) present an affidavit of the fact, such as was directed (to be made by the accused) by par. 1013, A. R. of 1889; 2. Time required to obtain the deposition of a distant witness; 3. Absence of written or documentary evidence; 4. Time to procure counsel; 5. Time to enable the accused to prepare his plea or defence; 6. The pendency of other proceedings in a similar or the same case before another court-martial or a civil court; 7. Temporary illness of the accused or the judge advocate, or of counsel, or of a prosecuting or other material witness.

To sustain the motion it should be established to the satisfaction of the court that the alleged ground really exists and is such as to justify the continuance. In granting the motion the court may reduce the time asked for, if it deems the same to be more than is reasonable.

A continuance moved for by a party is to be distinguished from an *adjournment*; the latter being generally resorted to by the court for its own purposes and on the motion of a member.

CHAPTER XIII.

THE TRIAL.

SUPPOSING all preliminary objections, motions, and special pleas, if any, to have been disposed of, and the accused to have pleaded "not guilty" to at least a portion of the charges and specifications,—all is now prepared for the Trial on the merits, the features and incidents of which will be briefly noticed.

Hours of session.—The court, having entered upon the trial, continues—as enjoined by Art. 94—to sit "*between the hours of eight in the morning and three in the afternoon,*" and usually daily, Sundays excepted, till the proceedings are concluded. There is no illegality in sitting on Sunday, but, except in time of war, it is rarely done. The hours of session may, according to the same Article, be extended "*in cases which, in the opinion of the officer appointing the court, require immediate example.*" As all cases of military offences may be said in a general sense to require immediate example, *i.e.*, to call for as speedy justice as can reasonably be administered, the discretion here conferred upon the convening officer has been liberally interpreted; and the instances in which it is added in the convening (or a supplemental) order that the court is authorized to sit "without regard to hours," are of frequent occurrence. In such cases the order generally specifies that such session is "necessary for the sake of immediate example," or in terms to that effect.

The general course of proceeding—Opening address.—The introduction of the evidence on the part of the prosecution, which usually follows upon the plea of not guilty, may be, and in difficult or elaborate cases very properly is, preceded by an opening, or brief introductory statement by the judge advocate. The defence in turn may be similarly opened on the part of the accused. Openings, however, are not common in practice.

Separation and exclusion of witnesses.—Where there are numerous or several witnesses, they are properly separated by excluding from the court-room at the outset of the trial all except the one about to testify, and subsequently permitting only those to be present who have fully given their evidence. The judge advocate, at the beginning, generally, and properly, notifies the witnesses to remain in an ante-room or outside the court-room, to await being called in, each in his turn. When this has not been done, the president, as the organ of the court, will ordinarily preface the hearing by a similar direction. Where the precaution has been omitted, either *party* may, at this or a later stage, bring the fact, that witnesses who have not yet been examined are present, to the attention of the court, which will thereupon properly order them to withdraw. From the general rule of exclusion, however, are to be excepted witnesses summoned as *experts*, who must often necessarily hear the evidence which precedes their own as a basis for forming their opinions, and also those called to testify as to *character* only. The *prosecuting witness*, if any, is also generally permitted to remain in court after he has himself fully testified.

Introduction and hearing of testimony.—The judge advocate now proceeds to introduce and examine his witnesses, subject to cross-examination on the part of

the accused, and also to offer such depositions and written evidence as he may have to exhibit, and having completed his showing announces that the prosecution rests. The accused then produces similarly the proofs on his side and similarly rests in conclusion. Evidence in rebuttal may follow on the part of the prosecution, and this, in the discretion of the court, may be succeeded on the part of the accused by evidence in reply to the same.

The hearing cannot legally be interrupted except by a *nolle prosequi* or dissolution authorized or ordered by the proper superior. The court must duly hear to the end all the witnesses offered by either party, provided they are competent, and their testimony is material and not unreasonably cumulative. Neither party can, by any act or objection, shut off the exhibition by the other party of evidence pertinent to the proof of his case.

Qualifying of the witnesses.—The witnesses, standing with uplifted hand, qualify by taking in open court the form of oath (or affirmation) prescribed in Art. 92. A witness, though he be recalled, or after testifying for one side be required to testify anew and in chief for the other, is never sworn but once,—*viz.*, when he first takes the stand. The oath at a trial by a general, regimental, or garrison court-martial is administered to the witnesses (as also to the reporter and interpreter, if any—see the forms of oaths taken by them in Circ. 12, H. Q. A., of 1892) by the judge advocate; this officer, when himself appearing as a witness, being sworn by the president. In view of the mandatory injunction of the Article, the form of the oath may not be departed from; but the witness may accompany the form by such additional ceremony as may be habitual with persons of his religious sect. Thus Roman Catholics are usually sworn on a copy of the Evangelists, with a cross impressed upon or

affixed to it, which is kissed by the witness. Jews are sworn by the five books of Moses, and in being qualified wear their hats. Chinese are now in general sworn by the usual form of oath administered through an interpreter, who explains it to the witness, and Indian witnesses have been sworn in a similar manner.

Order and sequence of testimony.—The court will in general leave it to the parties—judge advocate and accused—to introduce their witnesses and written testimony in such sequence as may be found by them most advantageous or convenient. Further, in its discretion and in the interest of truth and justice, the court may permit material evidence to be introduced by a party quite out of its regular order and place. Thus it may not only admit evidence at a later period of an examination which should regularly have been introduced at an earlier, and allow a witness to be recalled for direct or cross-examination upon a question or questions inadvertently omitted; but it may permit a case once closed on the part of the prosecution or defence, or on both sides, to be reopened for the introduction of testimony previously omitted or discovered since the closing. Even where the party is chargeable with *laches* in not offering the testimony at the proper time, the court may still permit its subsequent introduction if of so material a character that its exclusion will leave the investigation incomplete. But such departures are not frequent, and where *new* testimony is thus admitted, it must be admitted subject to the right of the other party to cross-examine and rebut.

Examination by the court.—It is open to any member of the court to put questions to the witnesses for either side; but such questioning is, regularly, postponed until both the parties have concluded their examinations, and is then resorted to for the purpose only or mainly of

the elucidation of some part of the testimony which has been left obscure.

The testimony to be in open court.—It is a general rule that all testimony, whether oral or written, and whether upon the main or an interlocutory issue, is to be introduced in open court, and that no testimony whatever shall be received by the court during a period of deliberation after it has been cleared. Where indeed a material witness stationed at the post at which the court is assembled, is unable through sickness or other disability to attend, the court may temporarily adjourn to the quarters or hospital where the witness may be, and receive his testimony taken in the usual manner, the accused of course being present.

Objections to testimony.—Objections, based upon grounds to be indicated in the next Chapter, may be taken by either party to questions or answers in the course of the examination of the witnesses, as also to the admission of written evidence. All objections should be *specific*: an objection expressed in general terms only (as where the party simply says—"I object," without adding his ground) should not be entertained by the court. The raising of objections on *technical* grounds should be avoided as captious and unmilitary.

To determine whether an objection to testimony is or not valid, the court more commonly *clears*, but objections of an unimportant character may be disposed of without this formality.

Reading over of testimony to witness.—When a witness has fully given his testimony, the same is regularly read over to him, and he is afforded an opportunity to correct it if erroneously recorded.

Reading of daily proceedings.—A customary part of the routine of a trial is the reading, at the opening of each day's session, of the proceedings and testimony of

the previous day, as recorded. At this reading the accused is entitled to be present, but he may waive the right: with his concurrence also a reading may be dispensed with.

The defence.—It is a principle to be scrupulously observed on a military trial that the accused, whatever his rank, is not only to be deprived of no right but is to be accorded every proper privilege—is in no manner to be embarrassed or placed at a disadvantage, but in every reasonable degree facilitated—in making his defence. As heretofore indicated, he is not to be shackled or otherwise restrained as to his person, unless it may be necessary to prevent escape or violence. On the trial he should be deprived of no material testimony, reasonably obtainable either by subpoena, order, or deposition, and whether the same be required to present his original defence, to rebut or reply to the testimony of the prosecution, to impeach its witnesses, to exhibit matters of extenuation, or to establish his own character or record. This principle applies with especial force in a case where the accused is an enlisted man without counsel.

Special defences.—Defences vary with the facts and circumstances of each case, and with the provisions of the Articles under which the charges are laid. The defences appropriate to charges for some of the principal military offences will be indicated in considering the separate Articles in Chapter XX. Certain special defences, however, may well be noted here, as follows:

Alibi.—This defence consists in a claim that the accused was not present at the time and place of the commission of the alleged offence but was *elsewhere*. It is a defence which, when satisfactorily established, is necessarily a conclusive answer to the charge. It is, however, easily fabricated, and, even when sustained by the testimony of *bona fide* witnesses, is subject to question

by reason of possible and natural errors as to dates, hours of the day, identity of persons, etc.: it is therefore to be entertained with strictness and caution. "A perfect *alibi* must cover the whole time when the presence of the prisoner was required" for the consummation of the offence. Where, however, it fails to include the entire period, it is still to be taken into consideration, and if sufficient to justify a reasonable doubt as to the presence of the accused at the time and place of the act, will properly induce an acquittal by the court. This defence is best tested by a searching cross-examination as to details; it may also be effectually assailed by evidence of admissions or statements of the accused at variance with the claim of *alibi*.

- The following special defences are significant as establishing an absence of criminal capacity or intent.

Ignorance of fact.—It is a general rule of law that ignorance of fact excuses crime; the theory being that, where a *bona fide* ignorance of fact exists, there must be an absence of the requisite wrongful intent. But this ignorance, to constitute a defence, must be an honest or innocent ignorance, and not an ignorance which is the result of carelessness or fault. Thus, in a military case, it must appear not to have proceeded from any want of vigilance, or from failure to make the inquiries or obtain the information called for by the obligations and usages of the service.

Ignorance of law.—On the other hand, it is a general principle that an ignorance or mistake of law does not excuse crime; it being a legal presumption that every man is cognizant of the laws of the country in which he dwells. This principle is applicable to military persons so far as regards their knowledge of and amenability to the general law of the land. Such persons also are generally to be presumed to have a knowledge of the special

laws and regulations governing the army, as well as of the General Orders which have been officially promulgated and of which they are bound from their position or circumstances to take notice. In the case of *officers* certainly this rule can scarcely admit of an exception; but the question may well arise how far enlisted men are to be charged with a knowledge of the Articles of War, when they have never had the same read to them, (as required by Arts. 2 and 128), or been otherwise afforded an opportunity to become apprised of their details.

Drunkenness.—The common law, though it does not indict for mere drunkenness, views it as a wrongful act. Crime, when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is in the wrong *ab initio*. Hence the established general principle of law that voluntary drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance, and no immunity from the penal consequences of such acts. Where, however, the *intent* necessary to constitute the specific crime is such that it can only be entertained by a person capable of a deliberate purpose,—as in the case of murder, burglary, or larceny,—the question whether or not the accused was drunk is pertinent as going to indicate whether the crime charged or some lesser one was actually committed. In military cases the fact of the drunkenness of the accused is generally admitted in evidence, not as tending to excuse the offence, but as going to indicate the intent or state of mind of the offender, and also as affecting the question of the measure of punishment to be adjudged in the event of a conviction. Where a deliberate purpose, or peculiar knowledge or intent, is necessary to constitute the offence,—as in cases of disobedience of orders in

violation of Art. 21, desertion, mutiny, cowardice, or fraud in violation of Art. 60,—the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defence to the specific act charged. In such cases, however, if the drunken act has involved a disorder or neglect of duty prejudicial to good order and military discipline—and such will almost invariably be the fact—the accused may and should be convicted of an offence under Art. 62, thus incurring some adequate punishment.

It is to be noted that drunkenness, to be admitted in evidence, or to constitute a defence, need not be caused by indulgence in spirituous liquors, but may, with the same effect, result from the voluntary excessive use of an intoxicating drug.

Insanity.—Insanity is a disease so perverting the reason or moral sense or both as to render a person not accountable for his acts. It is an exceptional and abnormal status (to be established in general by the testimony of medical experts), and as the law presumes a man to be sane till he is proved to be the contrary, the burden of maintaining insanity as a defence in a criminal case rests upon the accused. To constitute a defence on the ground of insanity it may be made to appear, on the one hand either that the accused, in committing the offence, did not, from mental derangement, comprehend the nature of what he was doing, or did not know that he was doing wrong; or, on the other hand, that, though aware of the nature and consequences of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent.

Insanity may be general or partial. It may consist

either of an entire or almost entire dispossession of the reason, or of some delusion or hallucination only, or of a monomania. A partial insanity is no defence where it relates to persons or things not connected with the crime charged. Insanity may also be permanent, or intermittent or temporary. If the party has lucid intervals when he is free from the disease, he will be responsible for criminal acts committed in such intervals. If at the date of the crime he has quite recovered from a previous derangement, he will be held accountable as if such derangement had never occurred. But the recovery must be clearly shown, otherwise the presumption of law will govern—that insanity once existing has continued to exist.

Insanity of whatever sort must, to constitute a defence, be absolute. No mere caprice or eccentricity, however arbitrary or extravagant, can be accepted as an excuse for crime.

Insanity may be a defence though resulting solely from intoxication. But such insanity, to relieve from criminal responsibility, must amount to a fixed mental derangement or delirium existing at the time of the act, and incapacitating the party either to appreciate its wrongfulness or to resist the impulse to commit it.

In military cases, where the defence of insanity or mental incapacity at the time of the offence is satisfactorily made out, the preferable course is for the court to *acquit on this ground stated*, leaving it to the reviewing authority to take such further action—by having the accused discharged the service, or sent to the Government Insane Asylum, or otherwise—as may seem to him expedient.

If at the arraignment or pending the trial the accused, though not alleging it as a *defence*, manifests insanity or imbecility, the court will properly suspend proceedings

in the case, and report the apparent fact to the convening commander for such investigation or other action as he may see fit to institute.

Obedience to orders.—That the act charged as an offence was done in obedience to the order, verbal or written, of a military superior, is, in general, a good defence at military law.

The act, however, must have been *duly* done—must not have been either wanton or in excess of the authority or discretion conferred by the order. Further, an order, to constitute a defence, must be a *legal* order. It must emanate from a proper officer—a superior authorized to give it—and it must command a thing not in itself unlawful or prohibited by law. In other words, it must be an order which the inferior is bound to obey. Unless, however, the order is palpably illegal on its face (which will be of the rarest occurrence), the inferior should presume that it is lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.

It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defence in time of *war*, as being warranted by the laws and usages of war.

Compulsion of the enemy, etc.—Where an officer or soldier is charged with the crime of having deserted to or joined the public enemy in war, or of having associated himself with rebels, mutineers, or the like, it is a good defence if he can show that he did so under an immediate danger of death threatened by the enemy or compelling party, or under other form of restraint and compulsion against which it was not physically possible for him to make any adequate resistance. Where the original compulsion has so overpowered the will of the party as to constitute a legal justification, he may yet

forfeit his right to have it allowed as a defence by voluntarily remaining and acting with the enemy, etc., when he might have escaped.

Requirements of military discipline.—As an inferior may defend on the ground that his alleged offence was committed in due obedience to a legal order of a superior, so a *superior*, when charged with some extreme violence or severity towards an inferior, may claim in defence that his alleged act was justified by the requirements of military discipline. This defence, however, should not be accepted as sufficient by a court-martial except in cases where it clearly and satisfactorily appears that the insubordination, criminal attempt, or misconduct of the inferior, could not have been repressed or prevented without a resort to the extreme measure which is the ground of the charge. In practice the striking or otherwise assaulting of soldiers, and the infliction upon them of summary and unauthorized punishments, by officers, have repeatedly been made the occasion of trials by court-martial, and, where not proved to have been fully justified by the demands of discipline, have induced severe sentences, or, if not thus visited by the courts (which in some instances have shown themselves too indulgent to the accused), have called forth severe reprobation from the reviewing commanders. Personal violence employed by an officer against an inferior, by the use of the fist, the sword or otherwise, is always an extreme measure, and must constitute a serious military offence when resorted to in a case where an emphatic and dignified command, or an immediate arrest ordered, would have repressed the insubordination. And the principle governing such cases is of course to be applied with especial strictness to those in which, in the enforcement of discipline, life has been taken. In *all* cases indeed of this general

class it should be satisfactorily established that the act was imperatively called for by the necessities of discipline at the time; that to all appearance, or in all reasonable probability, the mutineer or rioter could not have been repressed, the escaping deserter or prisoner recaptured, the assailant subdued, or the insubordinate inferior restrained or made subordinate, by any less extreme measure than that actually employed. Otherwise the defence should not be accepted as sufficient. And in time of *peace* the superior should be held to a stricter responsibility than in war.

The concluding statement.—The testimony on both sides being concluded, either party or both parties—the accused *first in order* and the judge advocate *after him*—may present a closing “statement” or address to the court, which may be oral, but is commonly read from a writing, to be subsequently entered in the record or attached to it as an exhibit. The statement, which is usually read by the party or his counsel, may consist of a brief summary or version of the evidence, with such explanation, or allegation of motive, excuse, matter of extenuation, etc., as the party may desire to offer. It may embrace, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law. The “statement,” however, is of course not *testimony*, and cannot be introduced or considered as such.

A very considerable freedom is allowable here within certain limits. The accused, for example, in his statement may sharply criticise the testimony as given by the adverse witnesses, and their apparent or supposed *animus* in giving it, as well as the conduct, motives, etc., of the persons through whose acts or at whose instance he has been brought to trial, and especially those of the actual prosecutor or responsible accuser. And evidence

of malice on the part of the latter will justify an increased asperity of comment. But between animadversion of this character and defamatory personalities a line should be drawn, and the latter should not be permitted. Further, a proper consideration for the discipline and established military relations of the service should exclude from the statement gratuitously disrespectful language toward superiors or the court, or other form of insubordinate expression. Where the statement manifestly exceeds a reasonable freedom, and offends in either of the particulars above indicated, the court may properly warn the accused that he is transcending the proprieties, and if he persists or does not withdraw the objectionable portion, may decline to allow him to proceed or refuse to admit the statement into the record.

Contempts—Art. 86.—In the course of the trial it may occur that the accused, or a witness, or other person present, military or civil, may say or do something in the nature of what is known to civil courts as *contempt of court*. This contingency is provided for by the 86th Article of War, as follows: "*A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder.*"

Effect of the Article.—The Article thus authorizes the punishment only of "*direct*" contempts—*i.e.*, threatening language, gestures, etc., or disorderly conduct, either in the presence of the court or so near the courtroom as materially to disturb the proceedings. "*Constructive*" contempts—the other kind recognized in the civil practice—*i.e.*, acts committed at a distance from the court or beyond its precinct, or which, involving no actual disorder, operate to obstruct the due administration of justice (such, for example, as a refusal or neglect of a witness to appear when duly sum-

moned, or his refusal to testify when called to the stand), would not be punishable by a court-martial under Art. 86, though the same might well constitute offences under Art. 62.

Procedure.—On the occasion of a contempt, the court suspends the proceedings, and calls upon the accused, who is properly entitled to a hearing, for such excuse or explanation of his conduct as he may have to offer. If he has none, or fails to tender a satisfactory justification or apology, the court proceeds to adjudge a punishment. The action of the court not being a *trial*, no formal charge or arraignment is required.

Punishment for contempt.—The punishment appropriate and usual for contempt is either a fine or forfeiture of pay, of small or moderate amount, proportioned to the nature of the offence and rank of the offender, or imprisonment for a certain number of days or hours in the guard-house or in quarters. The punishment, if a fine or forfeiture, may be executed through the orders of the reviewing officer, in passing upon the proceedings, in the same manner as a sentence. If the punishment consists in imprisonment or other bodily restraint, it may be executed through the order of the convening authority, upon a reference and report of the facts to him by the court, if he is near at hand or readily accessible. If not, the court, which is incapable of executing its own mandate, may apply in the first instance to the post or other immediate commander who will execute the judgment with the same propriety and legality as he executes the *arrest* of the accused under the charges, furnishes the court with a guard, or performs any other ministerial function in aid of its proceedings.

CHAPTER XIV.

EVIDENCE.

COURTS-MARTIAL will in general properly observe the rules of the law of evidence as recognized and followed by the criminal courts. The purpose, however, of a court-martial is to fully investigate charges and arrive at justice; and where a rigid enforcement of a technical rule of evidence will result in shutting out material facts or obstructing a thorough investigation, the court will be justified in departing from a strict observance of such rule. Proper occasions indeed for such departures will not be frequent in practice.

The subject of this Chapter will be presented under the separate heads of : I. Proof in General; II. Admissibility of Evidence; III. Oral Testimony; IV. Written Testimony.

I. PROOF IN GENERAL.

Under this head will be noticed: 1. What is to be proved; 2. How much is to be proved; 3. What is to be presumed; 4. What is to be judicially taken notice of.

1. **What is to be proved.**—Crime is made up of act and intent, and upon every criminal trial there are to be established three principal facts—*viz.*, That the act charged as an offence was really committed; That the accused committed it; That he committed it with the requisite criminal intent.

Proof of the commission of the act.—The *corpus delicti*, so-called, or the fact that the alleged criminal act was committed by some one, is, as a separate fact to be proved, especially illustrated in cases of homicide and larceny, and, at military law, in cases of the offences of false muster, mutiny, sending a challenge and relieving or communicating with the enemy, and of the crimes made punishable in Art. 58, and the frauds, etc., described in Art. 60. Here the fact that a person has been unlawfully killed, that property has been unlawfully appropriated, that a false return or muster has been made, that arms, clothing, etc., have been sold or through neglect lost, that a mutiny has occurred, that a challenge has been sent, that the enemy has been relieved, that a fraudulent claim has been presented, etc., is a distinct and primary fact to be established independently of the fact of the agency of the accused.

Proof of the agency and identity of the accused.—This, as a principal fact, is especially material to be clearly shown where the offence was committed secretly or in the night time, or where the accused was a stranger to the witnesses, or was one of a number of persons associated together or (by reason of their similar dress or otherwise) not readily distinguished from each other. In the cases of some of the military offences, as desertion, cowardice, drunkenness on duty, sleeping on post, etc., the agency of the accused is so connected with the act done that the proof of the latter is also proof of the former.

Proof of the intent.—In respect to the element of *intent*, crimes are distinguished as follows: those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offence; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom.

Of the former are murder, larceny, burglary, desertion and mutiny; of the latter arson, rape, perjury, disobedience of orders, drunkenness on duty, neglect of duty. In cases of the former class the characteristic intent must be established affirmatively as a separate fact; in the latter class of cases it is only necessary to prove the unlawful act, for every man is presumed in law to have intended to do what he actually does, and the burden of proof is upon him to show the contrary.

Under the head of the Defence, in the last Chapter, we have considered certain facts and conditions, the effect of the proof of which is to negative the existence of the element of wrongful intent in alleged crime, or to show an incapacity to entertain such intent.

2. How much is to be proved.—In a civil action the plaintiff needs in general but to make out a *prima facie* case, or to offer evidence materially preponderating over that of the defendant, to give him the verdict or judgment. But the quantity of the proof required (on the part of the prosecution) is considerably greater upon criminal trials, where there exists always in favor of the accused the presumption of innocence—a presumption from which results the familiar rule of criminal evidence that to authorize a conviction, the guilt of the accused must be established *beyond a reasonable doubt*. By “reasonable doubt” is intended not fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt suggested by the material evidence in the case. What is required by the rule is not an absolute or mathematical but a moral certainty.

This rule applies alike to each of the three main facts to be established upon a trial—the *corpus delicti*, the identity of the accused with the real offender, and the requisite criminal *animus*. Each must be proved be-

yond a reasonable doubt. The rule is equally applicable to military as to civil prosecutions.

3. What is to be presumed.—The subject of presumptions is a most important part of the law of evidence. Every crime which is established by circumstantial evidence (as nearly every crime in fact is in whole or in part) is established by presumptions; and a distinguished judge has said of Proof itself that it is “nothing more than a presumption of the highest order.”

Presumptions are most simply divided into *presumptions of law* and *presumptions of fact*. Presumptions of *law* are the conclusions or general principles which are arrived at by the law itself, and accepted by the courts without evidence, or in the absence of evidence to the contrary. Among the most familiar are—the presumption that every sane person, who is a free agent, contemplates the natural and probable consequences of his own acts; the presumption in favor of the sanity of persons in general; the presumption in favor of the innocence of every person accused of crime; the presumption of ownership arising from the open continued possession of property; the presumptions as to public officers (military as well as civil,) that they are legally in office, and that they properly perform their official duties. Presumptions of *fact* are simply *inferences* as to the existence of a fact derived from some other fact or facts—inferences not deduced by the law but by human reason. Varying with the circumstances of every case, they are not peculiar to judicial investigations, but illustrate the ordinary operations of the intellect in arriving at conclusions in general. Applied to criminal cases, they are inferences as to the fact of the guilt or innocence of the accused deduced from minor facts and circumstances, physical and moral. Presumptions of fact, however, may be *ex-*

culpatory as well as *inculpatory*, and the former may be availed of by the defence equally as may the latter by the prosecution.

4. What is to be judicially taken notice of.—There are, further, many facts which are so public or notorious that the courts will “*take notice of*” the same, *i.e.*, accept them as actual and existing, without proof. Thus courts will take judicial notice of the Constitution, public statutes and executive proclamations, the system and framework of the Government, the powers of the President and of the heads of the executive departments, matters of public history, the geographical features of the country, the situation of military departments, posts, etc. Military courts will also accept as authentic, without proof of their authority, the duly published orders and circulars emanating from the War Department or Headquarters of the Army, or from the headquarters of the different military divisions and departments. So, inferior courts will properly take judicial notice of the formal published orders of the commander of the regiment or post. Facts within the common observation and knowledge of mankind will also be judicially taken notice of without proof by military equally as by civil tribunals.

II. ADMISSIBILITY OF EVIDENCE.

This subject will be considered under the following heads: 1. General rules governing the admission of testimony; 2. Hearsay; 3. Confessions; 4. Evidence excluded from considerations of public policy.

1. General rules governing the admission of testimony.—These rules (which are the more directly illustrated by the testimony on the part of the *prosecution*) are the following: (1.) The evidence

must be relevant; (2.) The burden of proof of guilt is always on the government; (3.) The best evidence must be produced of which the case is susceptible.

The evidence must be relevant.—The testimony offered by the *prosecution*, whether oral or written, must be relevant—that is to say, must be apposite to the material averments of the charge and be such as to establish or tend to establish the commission of the offence alleged; otherwise it may be objected to as “irrelevant” or “immaterial,” and upon such objection will in general properly not be admitted by the court. The testimony to be admissible need not indeed *directly* or *immediately* sustain the charge, provided it merely “constitutes a link in the chain of proof;” and evidence offered which is seemingly irrelevant and is objected to as such may yet be admitted by the court, if persuaded that it will be rendered relevant by other testimony to be subsequently introduced. Upon the *defence*, not only is such testimony relevant as goes to sustain the denial or other defence offered, but also such as may establish good character, or avail to extenuate the punishment in case of conviction.

The burden of proof of guilt is always on the prosecution.—It is a rule of evidence that “the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.” And upon a criminal trial, where there stands at the threshold the presumption of the innocence of the accused, and the affirmative of the issue is thus necessarily asserted by the Government, the burden is imposed upon the prosecution of proving the existence of every material fact required to establish the offence charged.

The best evidence must be produced of which the case is susceptible.—The rule that proof is to be made by the highest existing evidence is one of *quality*, not of

quantity. It does not require that the greatest amount of evidence should be accumulated for the proof of any fact, but only that every allegation should be established by the *best*—that is to say, most authoritative and legally satisfactory—evidence available in the case. Where evidence is offered which is manifestly *secondary*—*i.e.*, such as indicates the existence of higher evidence for which it is clearly only a substitute, the substitutional evidence—the higher being attainable—is incompetent, and not to be admitted if objected to. Thus, where oral testimony is offered of the contents of a writing, and the writing still exists and can practicably be introduced in evidence, either as an original or by certified copy, the writing itself is the best evidence of its contents, and the oral testimony will be subject to rejection as secondary.

There are some exceptions to this rule, or rather cases to which it does not apply,—as where a material writing desired to be put in evidence has been lost or destroyed, or where it is in the possession of the adverse party, and he, though called upon to produce it in court, fails to do so. In such cases the contents of the writing may be proved by oral testimony.

2. Hearsay—Rule of exclusion.—Intimately connected with the rule last considered, requiring the production of the “best evidence,” is that which excludes the species of secondary evidence known as *hearsay*. Hearsay has been defined as that kind of evidence which “does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.” It is inadmissible, not only on account of its intrinsic uncertainty growing out of the fact that it consists of matter repeated at second hand, as well as because it presumes the existence of better testimony, but especially

because it introduces into the case statements not made under oath and the truth of which cannot be tested by the criterion of cross-examination.

Res gestae not hearsay.—The declarations, exclamations, etc., of persons made contemporaneously or nearly so with the commission of the offence, and going to indicate how or by whom it was committed, or otherwise illustrating its nature, are, when testified to by a witness on the stand, not hearsay but original evidence, and are admissible as a part of the "*res gestae*," as they are termed, of the transaction. Declarations, etc., offered in evidence as *res gestae*, must be shown to have been voluntary and spontaneous, and made so near in time to the principal occurrence as to preclude the idea of deliberate design.

Exception as to "dying declarations."—An exception to the rule excluding hearsay is recognized in cases of *homicide*, where the law allows the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them. It is necessary, however, to the competency of testimony of this character that the person whose words are repeated by the witness should have been *in extremis* and under a sense of impending death—*i.e.*, in the belief that he is about or soon to die. It is no objection to the admissibility of the declarations that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons; and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to.

3. Confessions—*Rules governing their admission in evidence.*—1st. A confession cannot properly be admitted in evidence till the *corpus delicti*, or fact that the

alleged criminal act was committed by somebody, is proved. 2d. Further, a confession, to be admitted, must be offered in its *entirety*, so that the whole may be taken together, and the complete purport may fully appear. If a material part is withheld, the part offered should not be admitted. A judge advocate upon a military trial may desire to keep out of sight a portion of a confession because it implicates parties other than the accused; but this is a reason not recognized as sufficient at law, since a confession is not evidence against any person (not an accomplice) other than the one who makes it. So the judge advocate may prefer not to discover a certain portion of the confession on the ground that it is erroneous or unsatisfactory; but this also is not a sufficient reason since he is at liberty to contradict such portion by other evidence. He must, therefore (unless objection is waived), introduce the entire confession or wholly withhold it. 3d. But the most familiar requisite to the admissibility of a confession is that it must have been *voluntary*; and this fact must be affirmatively shown by the prosecution in offering it. A confession is, in a legal sense, "voluntary" when it is not induced or materially influenced by hope of release, pardon, or other benefit, or fear of punishment or injury, inspired by one in authority; or, more specifically, where it is not induced or influenced by words or acts—such as promises, assurances, threats, harsh treatment, or the like—on the part of an official or other person competent to effectuate what is promised, threatened, etc., or at least believed to be thus competent by the party confessing. But the confession, though it must have been voluntary, need not have been *spontaneous*. It will be admissible though induced by the exhortations of a spiritual adviser, by appeals to the accused founded upon the claims of justice, the rights of other persons whose safety or interests are involved in his de-

clearing the truth, by making him partially intoxicated, or by practising upon him some deception by which he is entrapped into confessing.

In *military* cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges, to a commanding officer, judge advocate, non-commissioned officer of the company, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted.

These principles are equally applicable to a *written* as to a verbal confession. But it is to be remarked that where (as is often the case when it has been drawn up by another person) a written confession specifies that the statement is freely made, without hope of favor or advantage, or fear of injurious consequences (or in words to that effect), the inquiry as to whether it was *in fact* voluntary is in no manner precluded. But a confession, written or verbal, may always be *confirmed* by evidence going to establish its truth and to prove that it has not been fabricated.

In view of the peculiar conditions of mind and body under which accused persons are often placed when making confessions, of the liability to mistake on the part of the witnesses who repeat them when oral, and of the tendency of these latter to exaggerate through a zeal for conviction,—evidence of confessions, unless corroborated by other reliable evidence, is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and, if oral,

is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law.

4. Evidence excluded from considerations of public policy—*State papers, Public documents, etc.*—Of this kind of evidence would be the papers and documents belonging to the confidential archives of the Executive Departments at Washington, containing the correspondence of public officials and agents with the government, reports of investigations and other official communications made in the line of duty by officers of the army or navy to their military or naval superiors; and records of advisory boards and courts of inquiry. Such papers, on the ground that their disclosure would be prejudicial to the public interests, are held to be "*privileged*"—i.e., exempt from being made public as evidence on trials.

On the same principle, a public official—as an officer of the Army—who has been directed by an authorized superior to investigate a case of supposed dereliction and make report, cannot properly be required, as a witness before a court-martial, to disclose either the contents of his report, or the names of the persons examined by him or their statements.

To the general rule here given the courts have recognized an exception only in a case of an official communication clearly shown to have been made *maliciously* and *without due cause*.

Professional communications.—Declarations and statements, verbal or written, made to a *legal adviser*, are also protected from disclosure on the ground of public policy, and cannot be admitted in evidence if excepted to by the accused party by whom they were made.

III. ORAL TESTIMONY.

Oral testimony is that of witnesses testifying *viva voce* in court, or by deposition out of court.

The subject of Oral Testimony will be considered under the titles of: 1. The Attendance of Witnesses; 2. The Competency of Witnesses; 3. The Examination of Witnesses; 4. Testimony by Deposition; 5. The Credibility and Weight of Oral Testimony.

1. The Attendance of witnesses.—As has been seen in a previous Chapter, a Court-martial is not authorized, either by inherent judicial power or by express statute, to issue writs, and cannot therefore issue a writ, either of subpoena or attachment, to compel the attendance of witnesses. The authority for this purpose has been vested in the Judge Advocate, by Sec. 1202, R. S. The whole matter of the summoning of the witnesses, as also of the issuing, etc., of process of attachment, belong to the subject of the authority and province of the Judge Advocate, and has accordingly been considered in Chapter X.

2. The Competency of witnesses—*The accused as a witness.*—Some of the principal facts which once rendered witnesses incompetent to testify—as, for example, that they were *parties* to the issue or directly *interested* in it—affect no longer their competency but their credibility only. The accused himself, on a military equally as on a civil trial, is now competent to testify if he desires it. The subject of the *weight* to be attributed to his testimony will be referred to under a subsequent head.

Wives of accused persons.—These are still incompetent. The old familiar rule of the law of evidence that neither the husband nor the wife is competent as a wit-

ness either for or against the other, is strictly held in the criminal courts of the United States and in courts-martial. The rule is subject to exception only in cases where the trial is for "bodily injury or violence inflicted by the husband on the wife or *vice versa*." It should be done away with altogether.

Insane and intoxicated persons, etc.—Insane persons are incompetent as witnesses except at lucid intervals. A person insane on some one particular subject will not be incompetent as to other subjects if his delusion does not materially impair his general intelligence. Intoxication should render a person incompetent only temporarily, *i.e.*, only while the drunken condition continues. Idiots may or may not be incompetent according as their idiocy is complete or only partial. That a person is *deaf and dumb* does not render him incompetent, provided he has average intelligence and can communicate what he knows either in writing, or by signs through an interpreter.

Children.—The law has fixed no age at which a child may be presumed to have the requisite understanding to qualify it to be a witness: the competency of children depends more upon intelligence than age.

Insensibility to the obligation of an oath.—This is a ground of incompetency now seldom urged. That a person is not competent to take a judicial oath is never to be *presumed*, and, in view of the multiplicity of religious creeds and the freedom of religious belief recognized in this country and sanctioned by the Constitution, the objection to a mature person offered as a witness, that he was insensible to the obligation of an oath, would have to be most clearly established to be accepted as excluding him from the stand on a military trial. In the case of a very young child a less degree of proof would be called for, though here the proper objection would be that of deficiency of intelligence rather than

of religious sense. It is to be noted that the exception under consideration, where it exists in any degree to a witness, may in general be avoided by his making an *affirmation*, or solemn declaration, in lieu of an oath—as all witnesses are authorized to do by our law.

3. The Examination of witnesses.—This subject will be considered under the heads of: (1.) Direct Examination; (2.) Cross-examination; (3.) Re-examination; (4.) Rebuttal; (5.) The privilege of the witness as to not answering criminating questions; (6.) Impeaching testimony; (7.) Testimony as to character.

Direct examination.—This, which is also called the “Examination-in-chief,” is the original examination, by the party producing them, of the witnesses by whose testimony he seeks to maintain his side of the case. It refers mainly to that examination by which (subject to cross-examination by the adverse party) the prosecution or defence is opened and displayed.

Premising that the direct examination of every witness properly begins in general with asking his name, and, in military cases, his office, corps, regiment, etc., and whether he knows or identifies the accused,—we proceed to notice certain general principles which, though *in part* applicable to all stages of the examination of a witness, are best illustrated as governing the Examination-in-chief—as follows:

1. *The examination should consist of questions relevant to the issue.*—This rule, the application of which is one of the features which distinguish the direct from the cross-examination, has been specifically considered under an earlier title.

2. *All the testimony is to be viva voce, and to consist of facts derived from the personal knowledge and memory of the witness.*—This principle is, indeed, one of general

application, but is here noticed because of certain apparent qualifications which affect its operation in the course especially of the direct examination.

Memorandum to refresh memory.—Thus, the general rule is compatible with allowing a witness to “refresh and assist” his memory by a reference to some *writing*, which may be either an official document or other written instrument (original or copy), a formal entry in a book, or any mere note or memorandum, written or in print. Where the writing consists of a memorandum or paper made by the witness himself, it should appear, from his testimony, to have been made at the time of the fact or transaction to which it refers, or so soon after as to afford the presumption that the memory of the witness as to such fact, etc., was fresh in making it. Where the paper is not one made by the witness, it must appear that, on inspecting it, he can speak to the facts from his own recollection; otherwise he cannot be permitted to make use of it. Nor, indeed, can he use it in any case, or by whomever made, unless it enables or assists him to testify as of his own memory or knowledge. If, instead of serving as a refresher of memory, it is relied upon to supply facts not otherwise known to the witness, it is, of course, not a legitimate means of reference. It is usual and desirable (though not essential) that the writing be brought into court and produced by (or exhibited to) the witness upon the stand, since thus its nature and effect can be fully made to appear on the direct or cross-examination.

Statement of opinion or belief.—The principle under consideration excludes all matters resting in the individual opinion of the witness. His opinion upon the merits of the issue, or as to the motives, intention, or conduct of others, or the effect of their acts, or as to what would have been his own conduct in a particular

case, or upon any general question of moral or legal obligation, is wholly inadmissible and should be ruled out on objection made.

To this rule, however, two exceptions are to be noted. The *first* is where a matter resting on belief, but which is a matter of common observation, and in general palpable and scarcely mistakable, is directly in issue; as, the fact of *drunkenness* (or that the accused or other person was drunk on a certain occasion); or the fact of the *identity* of a certain person. So, as to the fact that a writing is or is not in the handwriting of a party: here a witness familiar with the handwriting may be asked and may state his belief as to the fact in issue without being an expert. In such cases the declaration of the witness is considered to be not so much a statement of his opinion as of a *fact* in his personal knowledge.

The *second* exception is the familiar one of cases involving questions of science or questions requiring for their solution a peculiar skill or knowledge of a speciality, in which is admitted the testimony of *experts*. Among the most frequent experts are medical men called to testify as to the cause of death or disease, the effect of wounds or injuries, the question of the sanity of a person, etc. Military officers may be experts as to technical or scientific questions with which they are especially versed, and their opinions on such subjects be admissible both in military and civil courts. The value of expert testimony will depend not only upon the knowledge and experience of the witness but also on the disinterestedness and reasonableness of his opinions.

3. *A party may not impeach the credibility of his own witness.*—This is also a general rule peculiar to the direct examination. A party, in offering a witness, is

presumed to be acquainted with his character and is viewed as representing him as entitled to credit. He is, therefore, in general bound by the statements of the witness, and if such statements are contrary to what he expected, he will not be permitted to impugn the credibility of the witness, either directly by attacking his general reputation for veracity, or indirectly by "general evidence tending to show him unworthy of belief." Where, indeed, his own witness has thus *surprised* him, he is not precluded from proving by *other* testimony the fact which he had proposed to prove by this witness.

4. *Leading questions are not to be asked.*—It is a further general rule governing the *direct* as distinguished from the *cross* examination, that a "leading" form of questioning a witness may not be pursued in regard to the material facts at issue in the case on trial. The 90th Article of war recognizes this rule in making it the duty of judge advocates to "object to any leading question to any of the witnesses," as a measure of protection to the accused. Leading questions may be said to consist mainly of three sorts, closely connected, however, in their nature, as follows: 1. Those "which suggest to the witness the answer desired;" 2. Those "which, embodying a material fact, admit of an answer by a simple negative or affirmative;" 3. Those which, in their form, "assume facts to have been proved which have not been proved," or assume "that particular answers have been given which have not been given." The proper and legitimate province of direct examination is to elicit the precise matters of fact within the knowledge or recollection of the witness and no more, and to induce him to communicate them naturally and in his own language without either prompting or restraint. Any direction, therefore, given to his thoughts, on the part of the interrogator; any suggestion as to the form or substance

of his answer; any repression of a full statement of what he has to say that is material; any deceit or disingenuousness concealed in the question that may tend to shape the reply of the witness, divert it from its intended form, or, in short, prevent or embarrass a true and honest response—these and all similar influences and expedients are, in general, irregular and unauthorized.

Exceptions, however, to the general rule are recognized in cases—1. Where the witness is manifestly *hostile* to the party by whom he has been called; or is in the *interest* of the opposite party; or exhibits, for some cause, a decided *unwillingness or reluctance* to testify, or a disposition to prevaricate; or is stupid; or is very young. 2. Where the testimony of the witness is defective in that he cannot recollect or specify a certain material fact: here it may be permitted to mention or suggest the particular matter in regard to which an answer is desired.

Cross-examination.—The direct examination of a witness being concluded, the opposite party, though he may waive it, proceeds ordinarily to avail himself of the right of cross-examination. The exercise of this right, as a test of the perception, observation, recollection and veracity of the witness—always important to the due investigation of truth and administration of justice—has become even more so than formerly; certain classes of persons who once were excluded from the stand being now admitted, and facts which once went to the competency now going to the credibility of the witness. In view of its purpose and significance, a much greater latitude is properly allowed in the cross-examination than in the direct; leading questions, for example, being freely permitted; and matters otherwise irrelevant and collateral being allowed to be gone into

to a reasonable extent (subject to the limitations yet to be noticed), where properly apposite to the testing of the knowledge, memory, or *animus* of the witness, or to discrediting him in general.

Upon the liberty, however, of cross-examination there are certain *restrictions*, as follows : 1. *It is to be confined to the matter of the direct examination.*—The rule is established in the United States Courts, and commonly observed in the military practice, of restricting in general the cross-examination to the subject and scope of the direct examination. Such rule tends to simplify and confine within reasonable limits the investigation of a criminal trial, and should not in general be allowed to be departed from before a court-martial. 2. *It is not to be extended to collateral matters with a view to contradict the witness.*—It is an established rule of the law of evidence, and which has been recognized in military cases, that a party cannot be permitted to cross-examine a witness as to any “collateral, independent fact, irrelevant to the main issue,” for the purpose of laying a foundation for subsequently contradicting him by other evidence and thus discrediting him; but that the answers of the witness to all such collateral interrogation are to be taken as conclusive against the cross-examining party.

But a question whether the witness has not at some *previous* time told a *different story*, or given a *different account* of the matter testified to on his direct examination, is not collateral or irrelevant; nor is a question whether the witness has not *previously expressed hostility toward the accused*. And questions of either kind, being relevant, may be asked the witness on cross-examination, with a view of contradicting him by other evidence, in the event of his returning a negative answer. The subject of testimony as to contradictory statements

will be recurred to under the head of "Impeaching testimony."

Re-examination.—Where the witness, in the course of the cross-examination to which he has been subjected, has made statements not in harmony with those made upon the examination-in-chief, or statements of a doubtful or equivocal character, an occasion is presented for his *re-examination* (or, as it is sometimes called, "examination in reply"), by the party who originally called him, for the purpose of eliciting from him an *explanation* of such statements, as also (if desired) of his *motives* in making the same. But this is, strictly, the full scope of a re-examination, which cannot in general extend to the bringing out of new matter; and hence the desirableness of exhausting a witness as far as possible on the original examination.

Rebuttal.—New evidence introduced on the defence, or otherwise, may always be rebutted by the opposite party. Rebutting evidence is direct evidence, and the same rules apply to it as to the direct examination. It should be noted that mere *cumulative* evidence, or evidence repeating facts already introduced at a previous stage, is not in general properly admitted by way of rebuttal.

The privilege of the witness as to not answering criminating questions.—This privilege is one most frequently exercised on the cross-examination. The principle is well established that a witness may refuse, and cannot be required, to answer a question the answer to which may tend to criminate him, *i.e.*, may tend to convict him of a criminal charge or expose him to criminal liability or punishment. The privilege is held to be one *personal* to the witness, which he may avail himself of or not as he sees fit. But where he has testified without objection as to the subject of the ques-

tion on the examination in chief, he cannot claim the privilege on the cross-examination. Where, on a trial by court-martial, a military witness objects to a material question as criminating which is clearly *not* such, the court will properly so advise him.

Impeaching testimony.—The credit of a witness who has been examined in chief is subject to be impeached, not only by counter evidence from the other side as well as by facts brought out in his cross-examination, but also by testimony bearing directly upon his *personal veracity*. This, which is that commonly intended by the term “impeaching testimony,” is either particular or general, being (1) testimony that the witness has made specific statements out of court contrary to what he has testified on the stand; or (2) testimony attacking his general reputation as a truthful person.

➤ *Testimony as to contradictory statements* is competent only in respect to matters which are relevant and material to the charge. To properly prepare the way for such testimony, the established procedure is, first to ask the witness, on the cross-examination, not in general terms, whether he has not made a different statement, or different statements, but whether he did not on a certain occasion make a certain diverse statement (specifying it), to a certain person named: this, in order that he may better remember what he has said on the subject out of court, and be afforded an opportunity to correct or explain his testimony as given—a practice clearly in the interest of truth and justice.

Testimony impeaching the general reputation for truth of a witness.—A party is always permitted to impeach the testimony of a witness to the merits, introduced by the adverse party, by evidence impugning his character for veracity. But this evidence must be *general*—must relate to the *general reputation* of the wit-

ness as a truthful person, at the time of his testifying; for, as it is well settled, evidence of particular deceits, falsehoods, false conduct, etc., of the witness is wholly inadmissible. The impeaching witnesses are not called to communicate their personal knowledge in regard to his speaking or not speaking the truth, or their own estimate or opinion of him as a veracious person or the reverse, but his reputation or character for truth among his neighbors or those with whom he is chiefly conversant.

It is not proper, though it has sometimes been permitted, to ask the impeaching witness whether he would *believe* the adverse witness *under oath*. Such a question calls for the individual estimate of the witness—a thing to be avoided in this proceeding, and invites an answer liable to be influenced by personal hostility or prejudice.

The impeaching witness, having given unfavorable testimony, remains subject to be *cross-examined* by the other party as to the means and sources of his knowledge. He is generally called upon to specify the particular individuals whom he has heard speak unfavorably of the character for truth of the witness attempted to be impeached, and may be interrogated as to the grounds upon which they based their opinions. The adverse party may in turn impeach the impeaching witness, or—as is often done—he may support the general reputation for veracity of his own original witness by testimony showing it to be good.

Testimony as to good character of accused.—This testimony is always admissible on behalf of the accused in military cases, whether introduced—(1) as going to indicate that, because of his good character, it is not likely that he could have committed the offence charged, or as going to rebut a presumption that he did commit it; or—(2) for the purpose of inducing a milder

sentence or a recommendation to clemency by the court, or a remission or mitigation by the reviewing authority. It may be presented in conjunction either with a plea of guilty or not guilty. It may have reference specifically to the subject-matter of the charge, or it may simply exhibit the reputation or record of the accused as a good officer or soldier, including particular acts of bravery, or meritorious conduct or service. It may of course be rebutted by evidence of a bad character or record; but such evidence is inadmissible unless testimony to prove good character has been first introduced.

4. Testimony by Deposition.—*When and how depositions may be taken.*—The use of depositions in evidence is authorized by Art. 91, as follows: “*The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.*”

Under this Article, the deposition of a witness, military or civil, stationed or residing as specified, may be taken and admitted in evidence in any case except that of an offence made *capitally punishable* by the code. Thus a deposition would not be admissible in a case of a spy, of a deserter in time of war, or of a person charged with an offence in violation of Art. 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 56, or 57, or with one of the offences designated in Art. 58, when made capital by the local law.

A “reasonable notice” will be a notice of a few days,—generally from one day to three days,—such being a period ordinarily sufficient to enable the other party to note objections (if he has any), to the direct interrogatories, prepare cross interrogatories, etc.

Notice to take a deposition (which should be accompanied by a copy of the direct interrogatories) may be given before the arraignment and indeed before the court assembles. If practicable, depositions should be, and in general are, taken before the stage of the trial at which it is proposed to offer them in evidence, since otherwise the proceedings may be considerably delayed. Where, however, pending a trial, a deposition becomes necessary, the court is authorized, by Art. 93, to grant a *continuance* till the deposition can be obtained.

A deposition taken without notice is no more than an *ex parte* affidavit and is inadmissible.

In taking a deposition, the witness may be sworn by the judge advocate of the court, or of a department, or by any official who, by the laws of the United States, or of the State, etc., is authorized to administer oaths.

Introduction in evidence.—The deposition is read in evidence subject to such objections to the questions or answers as may properly be made, *i.e.*, subject to the same exceptions as would be the oral testimony for which it is a substitute. A deposition should not be rejected for a mere *informality*. If complete—if it contains the entire testimony, under oath or affirmation, of the witness, in response to all the material interrogatories—it should be admitted.

The party by whom the deposition was initiated has no right to withhold it merely because the testimony given is not favorable or such as was expected. Nor can he introduce only such parts as are favorable or useful to him, omitting the rest. He must offer it as a whole or not at all. And if *he* does not offer it, the other party may do so if he chooses.

Form of taking deposition.—A deposition may be taken upon interrogatories independently framed by the judge advocate and accused respectively; *i.e.*, upon

separate sets of "Direct Interrogatories," "Cross Interrogatories," and sometimes of "Re-direct Interrogatories." A more expeditious and satisfactory form is that of a *deposition by stipulation*, where a single set of questions is agreed upon by the two parties as covering the case or the subject; the agreement operating as a waiver of the *notice*. A form for a deposition taken by stipulation is given in the Appendix. When the interrogatories have all been furnished or agreed upon, they are forwarded with subpoena (see Circ. 3, H. Q. A., of 1888) by the judge advocate to Department, etc., headquarters, or to the War Department, for the requisite action. The proper authority will designate an officer to meet the witness and take his deposition, or procure it to be taken, in the form of answers to the interrogatories.

5. The Credibility and Weight of oral testimony.—*The testimony of accomplices.*—While the testimony of an accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate for such purpose unless corroborated by reliable evidence. It need not indeed be confirmed as to all its parts; if sustained as to some material and important points, it may in general be credited as to others.

Testimony as affected by imperfect veracity or by discrepancy.—Even where the character for veracity of a witness is shown to be bad, his testimony is not necessarily to be altogether disregarded, but is to be considered in connection with the rest of the evidence, and such credit given to it as it may be found justly entitled to.

So where a witness is shown to have testified falsely as to a certain particular, the maxim *falsus in uno falsus in omnibus* is not necessarily to be applied, nor

is all his testimony necessarily to be disregarded. The presumption against his general veracity will indeed be strong where the false statement relates to some matter as to which he can scarcely be liable to mistake; still, though the falsity may be such as to discredit him in general, it does not follow that some portions of his testimony may not be true.

Falsehood and disingenuousness in witnesses are, as has been noticed in practice, not unfrequently indicated by their avoidance of particularization in their testimony. "Fabricators," writes Wharton,* "deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence; and hence it is properly held that a studied avoidance of details, by witnesses, throws suspicion on their statements. This however," it is added, "depends upon the object to be recalled;" it being not to "events of remote date," but to "matters which the witness, under ordinary circumstances, would remember" that the test most "fairly applies."

The testimony of a witness should not be regarded as impeached by the fact that his statement differs from that of another witness as to the secondary details of an occurrence, nor by the fact that others who were present did not hear or see what he states to have been said or done. Discrepancies as to minor matters rather tend to sustain the credit of witnesses, as indicating the absence of concert. And the perceptive powers, as well as the capacities and opportunities for observation, of witnesses, are so diverse that it is quite possible and natural that acts or words sworn to by one witness should have

* Criminal Evidence, § 389.

escaped the notice of another present at the same time and place.

Affirmative and negative testimony.—As remarked by the United States Supreme Court in an adjudged case*: “It is a rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, whereas it is impossible to remember what never existed.” Again, the negative witness may not have “forgotten,” but may simply have failed to perceive what has really occurred in his presence or near him. Of two equally honest witnesses, the one, from a superior faculty of discernment, or a superior opportunity for informing himself, or both, may have become cognizant of facts to which he can testify affirmatively, while the other, when interrogated as to the same matter, can only reply that he did not see or hear, or does not know, etc.; yet each will be a truthful witness. A witness may also have been mentally preoccupied at the time of the occurrence in question; or, for fear of involving himself or otherwise, he may have been unwilling to take notice of what was passing: in such cases also his testimony may be true, though of a negative character and of inferior relative weight.

Testimony of the accused.—In a case of importance in which the accused takes the stand as a witness in his own behalf, it may be embarrassing to determine exactly how far he is to be believed. His credibility will be subject to question oftener perhaps for the reason that it is not natural to expect an uncolored statement from a person charged with crime, than for the reason that he is to be supposed to have wilfully stated what is false.

*Stitt v. Huidekopers, 17 Wallace, 384.

His testimony will always be fair material for a rigid cross-examination, and, as has been observed by the United States Supreme Court,* “a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses.” How successfully he may endure this test is a circumstance which will be most material in measuring his credibility; but probably the safest general rule to apply to his evidence as a whole—at least where a *prima facie* case has already been made out against him by the prosecution—will be that entire credit should not be given to his statements except in so far as he is corroborated by disinterested witnesses or reliable written testimony.

Number of witnesses.—The relative number of the witnesses for the prosecution and the defence, though a material factor where the number on one side very considerably exceeds that on the other, is by no means decisive in general. The relative weight of testimony depends much less upon the number of the witnesses than upon the quality of their statements. Evidence is valuable according as it is the expression of such concomitants as superior intelligence, capacity of appreciation, habit of observation, and opportunity for acquiring knowledge, and a single witness in whose case these incidents concur will properly outweigh several less well qualified and informed witnesses.

Manner of the witness.—That the manner of the witness on the stand—his appearance, demeanor, style of expressing himself, etc.—is proper to be considered in connection with his testimony, as adding to or detracting from its credibility and relative weight, is a point frequently noticed by the authorities. Where, for ex-

* *Rea v. Missouri*, 17 Wallace, 542.

ample, the bearing of a witness is such as to indicate that he is simply making a statement of the facts within his knowledge and observation uninfluenced by interest or personal feeling, his testimony will carry very considerably more weight than where it is apparently colored by resentment or prejudice, or where, unconsciously perhaps to himself, he speaks as a partisan of the side on which he is called. So a reluctant and over-cautious witness, or a "willing" or "fast" one, is in general less to be credited than one whose evidence is neither calculated nor impulsive; who is frank without being diffuse. So, too, a clear and self-possessed witness will ordinarily make a better impression than an agitated or confused one. At the same time it is unquestionable that a perfectly reliable and truthful witness will not unfrequently fail to do himself justice from natural embarrassment or a lack of fluency, and that diffidence and hesitation on the stand are as often characteristics of an honest as of a dishonest witness.

A court-martial, by reason of the superior education and intelligence of its members, is a species of jury peculiarly qualified for the discriminations and comparisons necessary to be made in estimating the relative weight and credibility of oral testimonies.

IV. WRITTEN TESTIMONY.

This subject will be considered under the titles of:

1. Public Writings; 2. Private Writings.

1. **Public writings.**—These may be divided into:

1. Judicial records; 2. Other public documents.

Judicial records.—Records of courts of the United States or of the States will rarely be required to be offered in evidence on military trials. When so re-

quired, records of United States courts are proved by copies under the seal of the court, attested by the clerk; of State courts, by copies attested by the clerk and certified by the judge, as prescribed in Sec. 905, R. S.

Records of military tribunals are not, in a legal sense, judicial records, but public documents of the War Department or of military commands, and will be referred to under the next head.

Other public documents.— This second species of public writings consists, mainly, of the acts of the legislative and executive departments of government in their collective capacities, and of the official acts of the separate public functionaries, as contained in official books and papers forming the records of public transactions. These may therefore be divided into: 1. Legislative acts and acts of State—such as Acts and Resolutions of Congress and Congressional debates and proceedings, Executive proclamations and communications to Congress, etc., and Treaties; 2. Official books and papers.

(1.) Acts and Resolutions of Congress are proved by the Revised Statutes and Statutes at Large, as published in conformity with express legislation making the volumes legal evidence of their contents. Proceedings and debates of Congress are proved by the publications of the same as printed by the Public Printer. Where an act of Congress or proclamation of the President has been published in a General Order, a court-martial will properly accept such publication as sufficient proof. A proclamation or other public act of the Executive, not found published in one of the volumes of Statutes, may be proved by an authenticated copy from the State Department. Other executive acts, such as pardons and appointments (not contained in General Orders), are proved by copies from the State or other proper Department. Acts of the State or Territorial legislatures are

proved either by the authorized publications of the same, or by duly authenticated copies of the originals. [Sec. 905, R. S.]

(2.) As to the *second* class of public documents above specified—the books, papers and records of the Executive Departments at Washington are commonly proved by copies authenticated under the seals of such Departments. [Sec. 882, R. S.] Where an existing original is required, as where, for example, an accused is charged with having signed a false certificate on a pay roll or other voucher; here the original, if producible (see page 125), must be exhibited with proof of handwriting. An original paper on file in an executive department or office is proved by the person in whose legal custody it is, appearing as a witness on the stand and producing and swearing to the paper as the original.

Where a document of one of the Departments has been printed and published by the authority of statute, each printed copy is an original and proves itself. The Army Register is a document of this kind.

General and Special Orders.—The printed official copies of General and Special Orders, and General Court-Martial Orders, published by the competent authority, though not authorized by statute, carry upon their face such evidence of authenticity that they are always admitted as evidence before courts-martial in lieu of formally authenticated written copies of the originals. If a General or Special Order required, or material to be put in evidence on a military trial, has not been printed or published, and exists only in a written form, it is to be proved like any other official paper—unless admitted by consent without proof.

Proceedings of military courts are proved by the originals or by copies authenticated under the seal of

the War Department. Copies, however, furnished to the accused under the 114th Article of War from the Judge Advocate General's Department, with no other authentication than the indorsed attestation of the Judge Advocate General to the effect that the transcript is a "true copy," may be agreed to be admitted, and in practice are admitted, without further formality. Where indeed the proceedings have been promulgated in a General Order, and some fact, fully appearing in such Order—as the finding, acquittal, sentence, or action of the reviewing authority—is alone desired to be proved, the parties may well stipulate to admit as evidence of the same a copy of the printed Order.

Official papers of military commands, such as the records of inferior courts, books, official reports, communications and papers kept on file at the Headquarters of military Divisions and Departments, as also the various Regimental, Company, Post and Hospital books, etc., recognized by army regulations or military usage, not being strictly public records, are proved by the originals, produced and identified by the proper custodian appearing on the stand as a witness, or by copies of such papers, etc., or of the material entries in such books, attested by the proper commander or staff officer.

2. Private writings.—It will not unfrequently become necessary in military cases to put in evidence correspondence or other written communications or statements. The original writing proposed to be proved must be produced in court and be identified by the proper witness or witnesses as having been actually written, sent, received, published, etc. If it be a writing specifically referred to in the charges, the paper produced must appear to correspond in terms or substance with that thus set forth or described. If it be indefinite, obscure,

or incomplete, *per se*, it may be explained, elucidated or completed by other testimony. So, where expressed in a foreign language, it may be translated by a competent witness.

Proof of handwriting.—Where it is necessary to prove that a writing proposed to be put in evidence was written or signed by the accused or other person, and this cannot be shown, or satisfactorily shown, by the party who wrote or signed it, or by a subscribing witness (the paper not having been formally witnessed, or the witness being dead or not attainable), the same is properly established either—(1) by the testimony of witnesses having personal knowledge of the handwriting; or (2) by a comparison of writings made—in a military case—by the court.

(1.) *By witnesses having knowledge.*—Such knowledge must have been acquired in one of two ways. The witness must either have seen the party write, even if he has seen him write but once and then only his name; or he must have seen letters or other writings purporting to be in the party's handwriting, and have, in some manner—as by having corresponded with him on the basis of them, or having taken action upon them which he has acquiesced in, or otherwise—become satisfied that they were written by him. This, as has heretofore been noticed, is one of the few exceptional cases in which a witness may be permitted to declare his opinion or belief.

(2.) *By comparison with other writings in evidence.*—The handwriting of a paper may also be proved by a comparison, made by the court, between such paper and other writings, already in evidence in the case and proved or admitted to be genuine, of the individual whose handwriting is in question. To assist in the comparison, and in the determining of the question of gen-

uineness, the evidence of experts, *pro* and *contra*, may be introduced by the parties. The expert—who need have had no previous knowledge of the person's handwriting—may express his opinion upon such points as whether the signature is genuine or simulated, whether the writing of the paper is in a real or feigned hand, whether the signature and the body of the paper were written by the same person, whether the whole of the paper was written by the same individual and at the same time, whether a date or amount has been altered by the substitution of one figure for another, etc.; and he may state in full his reasons for his conclusions. The experience, however, of courts has shown that the testimony of experts in contests as to handwriting is not in general very satisfactory evidence.

Comparison with writings not in the case.—Whether the rule admitting the proof of handwriting by comparison with standards already in the case may be extended to a comparison with *other* writings proved or admitted to be in the handwriting of the party, but not in evidence in the case and quite irrelevant to it, has been much questioned. The tendency of modern judicial opinion is in favor of allowing such a comparison, but the strict rule of the common law is against it, and in the case of Cadet Whittaker, tried in 1881, the admission by the court, against the objection of the accused, of standards extraneous to the case, was held erroneous, and because of such error the proceedings and sentence were disapproved.

The main objections to using, as standards of comparison, writings not in the case as evidence are, that there is danger that the same may be deliberately selected from the mass of the correspondence, etc., of the party as the specimens most favorable for the purpose, and may not therefore fairly represent his average hand-

writing; and further that their introduction may open the door to collateral issues. But where other better means are wholly wanting, a *court-martial* may—it is believed—safely be trusted to depart from the strictness of the old rule, and avail itself of the form of comparison in question, rather than leave the investigation incomplete and risk a failure of justice.

CHAPTER XV.

THE FINDING.

THE evidence having all been introduced, and the Trial, with the concluding arguments or statements if any, having been completed, the court proceeds—in general without any adjournment if the legal hours of session have not elapsed—at once to its Judgment, which consists of the Finding and (in the event of conviction) the Sentence. If, indeed, the case is one in which considerable evidence has been taken and the judge advocate has not been enabled to bring up his record, the court may in its discretion adjourn to afford him time for the purpose. So, in any case of importance, it may properly take an adjournment before entering upon the responsible duty of the Finding.

The subject of the Finding will be considered under the heads of—1. Mode and Rules of Procedure; 2. Forms of Findings; 3. Additions to the Finding.

1. Mode and rules of procedure—*The clearing.*—The presiding officer announces that the court will be cleared for deliberation upon its findings; whereupon the judge advocate, the accused, counsel, clerks, reporters, guards, witnesses, spectators and all other persons present withdraw, and the doors are then closed.

The deliberation.—The discussion, if any, which is had at this stage should be free, frank and open. Here, as in all other deliberations of the court, the principle

of the perfect equality of the members should be observed, and a junior officer in rank or age be conceded the same right to declare his views as a senior. So, whatever opinions or views are expressed, should be expressed to the court, not to separate members. As has been remarked in regard to the members of a jury: "If they do not spontaneously agree, they should confer together, each speaking in the hearing of all, not in clusters of two or three privately."

Should the court adjourn pending its deliberation upon the Finding, or before completing the same, the members—it need hardly be said—should not allow themselves to converse with or receive communications from other officers or persons in reference to the case under investigation. Making a personal communication to a *juryman* "is an indictable offence when such communication touches the subject matter of the trial, or it may be treated as a contempt of court. So, "it is a misdemeanor in a juryman knowingly to permit such communications." Similar acts by military persons would be punishable as military offences.

The voting.—This may be *viva voce*, but in cases of importance is commonly and preferably conducted by written, unsigned ballots. The votes—properly collected by the president, the judge advocate being now excluded—are taken, first upon the specification and then upon the charge, or, when there are several specifications, upon the same in order beginning with the first, and lastly upon the charge. Where there are several charges, the same proceeding is had as to each of the charges and its specification or specifications, separately, usually in the order of their number.

In taking a vote the president, conforming to the rule prescribed by Art. 95, calls first upon the junior member, then upon the next senior, and so on. The

provision of this Article—one of the oldest in our military law—was enacted no doubt upon the theory that the voting would be *viva voce* and open, and the reason which has been assigned for it is that the junior members, if required to vote first, will be less liable to be influenced by the opinions of their seniors. Where, however, the voting is by written ballot, the reason of the statute scarcely applies.

Every member must vote upon each charge and specification. A failure to vote would be a neglect of the duty impliedly enjoined by the order detailing the member upon the court, and also a violation in substance of his oath in which he swore “well and truly to try and determine;” and would thus constitute a military offence within the description of Art. 62.

In all cases, whether grave or slight, and whether capital or other, the result upon the Finding, as elsewhere in the proceedings, is determined by a majority of the votes. If, for example, three members of a court of five vote Guilty on any charge or specification, the accused is legally convicted thereon. If—there being an even number of members—the vote is a *tie*, the accused is strictly neither convicted nor acquitted; but as he is certainly not convicted, the vote inures to his benefit and is equivalent to an acquittal, and the finding is entered on the record as Not Guilty.

Modification of the finding.—A finding once made may be modified at a subsequent session of the court before the final conclusion of the proceedings in the case. For example, where the court, after a finding of conviction, has adjourned before taking up the matter of the sentence, it may, on reassembling, decide first to reconsider its finding, and may thereupon change it entirely (substituting an acquittal for the conviction), or modify it in any part.

The finding an act of the court—Protest.—In the findings as finally made and recorded, whatever they may be and however small may be the majority by which they were arrived at, the court acts as a *unit*. In law the finding is its act, not the act of certain members. So neither the minority nor any members or member can protest against a finding after it has been reached by a majority vote. No protest can be permitted to be entered in the record; nor can a member or members address a personal protest to the commanding general or other superior authority, without being chargeable with grave irregularity.

2. Forms of findings—*Finding of Guilty or Not Guilty.*—Where there are several specifications, to find Guilty of but one and Guilty of the charge is a consistent and valid finding, since to support a conviction of the charge it is only necessary to convict upon a single properly pleaded specification under it. But to find Not Guilty (or Guilty without criminality) of the specification, or of all the specifications where there are several, and Guilty of the charge, is an inconsistent and incongruous verdict, since the finding on the specification or specifications deprives the charge of support—leaves it wholly without substance—and a finding of Guilty upon it is a nullity in law.

On the other hand, to find Guilty of the specification, but Not Guilty of the charge, may be a good and legal verdict. It is such where the facts set forth in the specification do not, as stated, or under the circumstances as developed by the evidence, constitute the military offence indicated by the charge. But where the specification is properly drawn, and the facts as averred therein must, if found, constitute such offence,—to find Guilty of the specification but Not Guilty of

the charge is erroneous and contradictory, and such a finding will not support a sentence.

"Confirming" the plea.—A familiar form of finding (or rather of recording the finding) upon a charge or specification, where the finding is the same as the plea, is by *confirming*, as it is expressed, the plea. This form, however, has no further or other legal effect than a simple finding of Guilty or Not Guilty, as the case may be.

Expression of acquittal.—Where the accused is found Not Guilty on the charge or charges, it is usual to add in terms that he is *acquitted*. This is indeed unnecessary since the findings as made fully acquit the party in law; but the form is now so well recognized that to omit it in any case would be exceptional and invidious.

Guilty "without criminality."—Usage has given sanction to a form of finding, on a *specification*, of "Guilty, but without criminality," or "attaching no criminality," or in terms to such effect. It is principally resorted to where the accused is found to have committed the acts or done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the military offence charged. Such finding will of course properly be accompanied by a finding of Not Guilty of the *charge*, unless indeed there be in the case some other specification upon which an unqualified finding of Guilty has been arrived at. This finding, however, is not one to be encouraged. It is virtually a form of acquittal, being a determination that the accused is not guilty in law. It will therefore be more legally accurate, as well as more military and more just to the accused, to express and record the finding simply as "Not Guilty."

Finding with exceptions and substitutions.—Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid,—that is to say, is

guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details,—it may, and it is its duty, in convicting him thereon, to *except* specifically from the finding of Guilty such portions as are not proved, and thus declare the exact measure of the criminality deemed to be established.

A finding with exceptions upon the *charge* is rare, and is allowable only where the charge is inartificially and faultily drawn, or is “double,” or expresses more than the offence found. Where the charge is duly worded according to the terms of the Article of war upon which it is based, it is properly indivisible and an exception of any part made in the finding will not be legitimate. Thus where the charge is “Conduct unbecoming an officer and a gentleman,” to except from the conviction thereon the words “and a gentleman,” and find the accused guilty of conduct unbecoming an officer only, would be irregular and unauthorized. The latter is not an offence specifically known to the military law, and if, in such a case, the court do not consider the conduct to be unbecoming a gentleman as well as an officer, they should either acquit the accused altogether, or find him (according to the usage presently to be indicated) guilty of “Conduct to the prejudice of good order and military discipline.”

In making *exceptions* as to items in the *specifications*, not precisely proved—such as amounts, numbers, quantities, names, dates, places, words spoken, or allegations—the court is authorized to go further, and *substitute* the true facts or details, or proper allegations. A substitution, however, like a mere exception, must not so modify the specification as to render it inappropriate to the charge as found.

The authority to except and substitute in findings on

specifications is one of very considerable value and convenience in the procedure of courts-martial. By its exercise in a proper case the finding is made to correspond with the precise facts, justice to both sides is more nearly done and the accused is the more effectually protected against a second prosecution based upon the same transaction.

Conviction of a lesser offence.—Where the offence charged involves and contains a lesser offence as a legal part of it, and the evidence falls short of establishing the greater but shows that the accused was guilty of the lesser offence, the finding may, and should, be expressed accordingly. Thus, under a charge of desertion, where the testimony, while showing an unauthorized absence, fails to fix upon the offender the *animus* peculiar to desertion, the court may and properly will find him not guilty of desertion, but guilty of absence without leave, and this whether his plea has been to such effect or he has simply pleaded Not Guilty. Similarly, manslaughter may be found under a charge of murder, larceny under robbery, and an attempt to commit an offence under a charge for the offence itself. In resorting to this form of finding the court will properly make such exceptions and substitutions of words or allegations as may be necessary to render the findings on the specification and charge consistent.

Conviction under one Article of War of a violation of another.—Where the accused is charged with a violation of an Article, making punishable a certain specific offence, he cannot legally be found "Not Guilty, but Guilty" of some other specific offence made punishable by another Article. To find a party guilty of an offence quite distinct from that for which he was arraigned, and to which he has pleaded and against which he has defended, would be contrary to a fundamental principle of

criminal law. But in the military practice, where the evidence fails to fix upon the accused the specific offence charged, but shows him to have committed a military neglect or disorder as involved in his act or acts, the court is, by established usage, *always authorized* to find him guilty of "conduct to the prejudice of good order and military discipline," the offence designated in the *general* (62d) Article. This frequent finding, which is resorted to in order to prevent a failure of justice, is substantially a form of finding guilty of a lesser offence, since every specific offence involves a neglect or disorder.

3. Additions to the finding.—In acquitting or convicting, the court may in a proper case characterize its finding, or accompany it with remarks or recommendations.

(1.) Thus, in pronouncing the accused Not Guilty, the court, in lieu of a simple acquittal, may "*fully*" or "*honorably*," or "*fully and honorably*" acquit. These terms add nothing to the legal effect of the acquittal, but are sometimes employed in exceptional cases, though less so than formerly.

(2.) The court in connection with an acquittal may also *reflect upon the charges* as malicious, frivolous, vexatious, unfounded, etc., or upon the *accuser or prosecutor* (or prosecuting witness), as actuated by personal animosity or other improper motive, or as equally culpable with the accused, or more culpable, etc.

Such reflections, however, are not now frequent in our practice, the court commonly leaving this class of criticisms to be made by the reviewing authority.

(3.) The court may animadvert upon any *improper conduct*, during the trial, by a member, the judge advocate, the accused, a counsel, or a witness. Where a witness is believed to have sworn falsely the court may

with peculiar propriety call the attention of the reviewing officer to the fact.

(4.) Where the evidence has disclosed a *defective state of discipline* or an objectionable practice at a post, etc., the court, in its discretion, has sometimes remarked upon the same, recommending administrative changes or reforms.

(5.) Courts-martial are sometimes induced to add *explanations* of their findings or to give the reasons therefor, especially where the same, in view of the character of the testimony, may appear to require justification. Such action, however, must in general be unnecessary and unadvisable.

In cases where a conviction is arrived at, these additions, if any are made, are inserted after the sentence.

CHAPTER XVI.

SENTENCE AND PUNISHMENT.

THE Finding having been completed, and having resulted in a conviction upon the Charge or upon some one at least of the Charges where there are several,—or in a conviction of a lesser offence included in one charged,—the court (unless reopening for the purpose of receiving evidence of former convictions, according to par. 929, A. R.) next proceeds to adjudge the Sentence—i.e., to affix the penalty or penalties for the offence or offences found.

Par. 929, A. R., authorizes courts-martial, after arriving at their findings and before proceeding to sentence, to receive evidence (the accused being of course present) of *previous convictions* by court-martial of the accused. These are proved by official copies of the records of trial (or, in a case of conviction by summary court, by the record of the court itself), or by copies of the Orders promulgating the proceedings and showing the actual offences of which the soldier was convicted. [Such copies indeed are required to be forwarded with the original *charges*. See page 65.]

The subject of this Chapter will be conveniently presented under the following heads: 1. The Course of Proceeding; 2. Classification of Sentences; 3. Principles governing the imposing of discretionary sentences;

4. The specific punishments separately considered; 5. Remarks with sentence, and Recommendation.

1. **The course of proceeding**—*Voting and deliberation*.—Where the Article or Articles of War, under which the accused has been convicted, is or are mandatory in expressly requiring a certain punishment or punishments specified to be imposed upon conviction, the office of the court simply is to cause the legal sentence to be entered of record by the judge advocate, no discretion being allowed and no deliberation or vote being called for. In cases, however, in which the sentence is left by the code to the discretion of the court, the members, the verdict being completed, commonly proceed at once to vote for a punishment or punishments, in the manner usually observed upon the Finding and already indicated. The court may of course take an *adjournment* between finding and sentence if deemed proper and expedient.

The voting may be either oral and open, beginning with the “youngest in commission” of the members, as directed in Article 95; or in writing and secret, the member’s name not being appended to his vote. The latter form is, except in simple cases, that usually pursued: it is also in general the preferable one, not only because, the votes of individuals not being known, there can be no danger that the opinion of a senior member will unduly influence that of a junior, but also for the reason that the different awards, combining as they may several distinct penalties, will when expressed in writing be the more definite and explicit and the more readily compared.

The ballots—the judge advocate being excluded—are properly collected by the president and counted and announced by him. Where no punishment is found to be concurred in by a majority upon the first vote, fur-

ther votings are to be had until some final sentence comes to be approved by a majority of the members present.

After the first vote, or at any other stage of the voting, the members, with a view to the reconciling of differences of opinion, may engage in such discussion as may be desirable; and here, as upon the Finding, the equality of the members is to be preserved, a junior being entitled to the same freedom of expression and the same consideration as a senior.

Neither law nor regulation has prescribed any special routine to be pursued in the making up of the sentence. But where the sentences originally voted are found all to differ, it has been an approved practice for the court to proceed to vote upon them in succession, beginning with the least severe, until one of them receives the vote requisite for its adoption. A majority of the votes may sometimes be found to concur in some one penalty or more: in such a case the proceedings will be simplified by treating such penalty or penalties as agreed upon, the voting being then resumed upon the other propositions.

Case of joint accused.—When two or more persons have been tried on joint charges and convicted, their sentences (like the findings in their cases) must be *several*, although the punishments awarded be the same. If the sentence be discretionary with the court, a *separate voting* or concurrence should be had as to the sentence of each of the accused.

Majority and two-thirds votes.—The question of the selection of the sentence, or of any punishment, like all other questions arising in the procedure of our courts-martial, is (except in the single instance of the death penalty) determined by a majority vote. In the excepted case two-thirds of the members present and

acting must—as required by Art. 96—concur—*i.e.*, four of a court of five members, five of a court of seven, six of a court of nine, eight of a court of eleven and nine of a court of thirteen. In all other cases a simple majority is sufficient. A *tie* vote, given where there is an even number of members, is futile and determines nothing. Where it occurs, the voting must be continued till a majority in favor of a certain sentence or punishment is obtained.

The deliberation or voting need not of course be prolonged where, after repeated votes or comparison of views, the difference is found to be *irreconcilable*. In such a case the court, in lieu of coming to a formal sentence, can only enter upon the record the fact that they are wholly unable to agree, and thus terminate the proceeding, subject to the action of the reviewing authority. Such a contingency would be most likely to happen where—the sentence being discretionary—there was an even number of members: in any event, however, it would be of rare occurrence.

Obligation to vote a sentence.—Upon a conviction, every member must vote a sentence, whether he has voted to convict or to acquit upon the finding. The conviction as arrived at by the majority is the conclusion of the court, and each member, in voting upon the sentence, must accept the fact of guilt as settled, and consider only what is a proper punishment for the guilt as ascertained. He must also not only vote a sentence but—where the punishment is discretionary—an adequate sentence—*i.e.*, one commensurate to the offence or offences found. If, having voted to acquit, he gives his vote for a slight and inadequate penalty, he fails in his full duty as an officer and member of the court.

Compromise or chance sentence.—For the court to make up its sentence by dividing the aggregate of the

different quantities of punishment voted—as the terms of imprisonment, fines, or amounts of pay to be forfeited—by the number of the members, and taking the average result as the sentence to be adjudged, is clearly not a proper or military proceeding. To determine upon a punishment by *casting lots* would be still more irregular.

Adjournment and reconsideration.—If deemed, for any reason, desirable, the court may adjourn pending its deliberation upon the sentence. So, too, after a sentence has been agreed upon, the court is authorized to reconsider and modify the same at discretion, and at any time before the transmittal of the proceedings to the reviewing officer. The sentence determined upon after an adjournment and reconsideration, though quite different from that first awarded, is *the sentence of the court*.

2. Classification of sentences.—*Mandatory and discretionary sentences.*—Sentences and punishments may be distinguished as mandatory and discretionary. The former are those imposed under Articles of War which require that a certain specific punishment shall be imposed upon conviction. These are the 5th, 6th, 8th, 13th, 14th, 15th, 18th, 26th, 27th, 28th, 38th, 50th, 57th, 59th, 61st, 65th, 100th, and Sec. 1343, R. S. In imposing sentence for the offences made punishable under these Articles, the province of the court is simply ministerial—to pronounce the judgment of the law. It has no power to affix a punishment either more or less severe, or other, than that specified: any different or additional punishment is simply a nullity and inoperative. If more penalties than one are prescribed for the offence by the statute, all are to be included in the sentence: if any one is omitted the sentence is illegal and of no effect. Where there has been a conviction upon

several charges setting forth different offences for which different mandatory punishments are provided, all must be embraced in the sentence. Where the conviction has been of offences for some one or more of which the punishment is mandatory, while for another or others it is discretionary, the mandatory punishment or punishments must certainly be affixed, no matter how widely or variously the court may further exercise its discretionary power of punishment in the same sentence. Indeed, in all cases of punishments of the mandatory class, it is not the court which decrees the penalty but the statute.

The Articles which leave the punishment to the *discretion* of the court are the 3d, 16th, 17th, 19th, 20th, 21st, 22d, 23d, 24th, 26th, 27th, 28th, 30th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th, 49th, 50th, 51st, 54th, 55th, 56th, 58th, 60th, 62d, 68th, 69th, 86th and 101st. The discretion here conferred extends not only to all punishments authorized by military law and usage but also to the imposing of different punishments in the same sentence. For a long period also no *maximum* limit was prescribed, and—except in Art. 58, where it is declared that the punishment shall not be less than that provided for the like offence by the law of the State, etc.—no *minimum*. At length, by an Act of Congress of Sept. 27, 1890, enacted for the purpose of inducing something like uniformity in the penalties adjudged by courts-martial in similar cases, it was provided that whenever by the Articles of War the sentence is left to the discretion of the court, "*the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe.*" Accordingly, a code of maximum punishments was prescribed by the President under this Act, for cases of enlisted men, which was first published in

G. O. 21 of Feb. 27, 1891.* This code must be carefully considered by courts-martial in imposing sentence in such cases. Both the statute and the Order will be found in the Appendix.

3. Principles governing the imposing of discretionary sentences.—(1.) *The sentence is to be based upon the facts as proved and found.*—It is only the facts of the particular case, as exhibited by the testimony and ascertained by the findings, that can furnish a legitimate basis for the sentence. In general the measure of the punishment should mainly depend upon the circumstances shown to have preceded and accompanied the offence and illustrated its nature, upon the intent shown to have been entertained by the offender, upon his *animus* towards the aggrieved person if any, the consequences of his act, and its effect upon military discipline.

(2.) *Discrimination should be made between different classes of offenders.*—Where there are joint accused, different degrees of punishment will often properly be called for, according to the parts, whether leading or secondary, taken in the criminal transaction by the several individuals. Where a non-commissioned officer has been concerned with a private soldier in the offence, and is jointly charged and convicted with him, his sentence, for manifest reasons, should be more severe than that of his associate. So, the sentence of an officer or non-commissioned officer, convicted *singly* of a military offence, should in general be more severe than would be that of an inferior under the same or similar circumstances. It is, however, to be noted that a punishment which affects military *rank* is in general a severe one, and the more severe in proportion as the rank is the higher, so that reduction in the case of a non-commissioned officer, or suspension in that of a commissioned officer, will often

* Supplemented by G. O. 30 of 1893, as to the punishment for *fraudulent enlistment*. The original order, repeatedly amended, has been last revised by G. O. 16 of 1898. (See Appendix, p. 382.)

prove a more rigorous penalty than would a considerable term of imprisonment in the case of an enlisted man. The rank and office of the accused will thus properly enter into the question of the proper measure of punishment to be apportioned.

(3.) *Constitutional restrictions upon punishment are to be observed.*—The Constitution, in Art. VIII. of the Amendments, provides that “excessive fines” shall not be “imposed, nor cruel and unusual punishments inflicted.” This provision applies, indeed, only to the courts of the United States, but courts-martial, though, as we have seen, no part of the United States Judiciary, and not legally *bound* by such provision, will properly observe it as a general rule of practice. A “cruel” punishment would be one which inflicted an amount of suffering out of all reasonable proportion to the full demands of justice. An “unusual” punishment would be one not recognized by law or sanctioned by usage.

(4.) *Prohibited punishments not to be adjudged.*—Certain punishments are expressly or impliedly prohibited by the Articles of War. Thus Art. 96 expressly prohibits the imposition of the death penalty except in cases where the same is specifically authorized by the code. Art. 98 expressly prohibits the punishments of flogging, branding, etc. Art. 97, by a necessary implication from its terms, prohibits confinement in a penitentiary for purely military offences. Art. 83 precludes *inferior* courts from inflicting “a fine exceeding a month’s pay,” and from imprisoning or putting to hard labor “for a longer time than one month.”

(5.) *The sentence must constitute a criminal judgment.*—A sentence of court-martial, as has already been indicated, cannot legally assume to impose any form of *civil* liability, whether in the nature of debt or damages. It cannot appropriate or dispose of the *pay* of an accused

or impose upon him a *fine*, to the use or for the benefit of any individual military or civil, but can forfeit or adjudge the same to the United States only. Further, a military court cannot condemn an accused to return a specific article of property to a person whom he has illegally deprived of the same; nor can it sentence him to be imprisoned until he pays a certain amount, or restores certain property, to a private individual. Thus a court-martial, in framing its sentence, can recognize no liability or obligation on the part of the accused except to the United States.

— **4. The specific punishments separately considered.**—*Punishments legal and appropriate for officers.*—These are Dismissal or Cashiering, Disqualification for office, Suspension (with or without loss, or partial loss, of pay), Loss of relative rank or files, Reprimand or Admonition.

Dismissal or Cashiering.—Dismissal and cashiering were formerly regarded as quite distinct in military law; the latter involving, in addition to a dishonorable separation from the service (which is the definition of *dismissal*), a disability to hold military office, and thus constituting a more severe punishment than the former. All such distinction, however, has long ceased to exist, cashiering having become identical with dismissal. In all the present Articles of War in which this punishment is named except two—the 8th and 50th—"dismissed" is the word adopted, and in those "cashiered" was retained, apparently through inadvertence.

Dismissal, to the exclusion of any other punishment, is *required*, by Arts. 5, 6, 8, 13, 15, 18, 26, 27, 28, 38, 50, 59, 61 and 65, to be adjudged upon conviction of the offences in these Articles specified. It is also *legally impossible* upon conviction of any offence of an officer of which the punishment is made discretionary with the court.

Execution of dismissal.—This punishment is *executed* by operation of law, immediately *upon approval or confirmation, and notice* to the officer. Upon the day of the official announcement to an officer of the approval or confirmation by the proper authority of a sentence dismissing him from the military service, his connection with the Army at once ceases and he becomes a *civilian*. If at the date of the approval, or on the day on which information of the same arrives at his station, the officer is absent on duty, or a prisoner in the hands of the enemy, or otherwise prevented from receiving notice of the dismissal as approved, the same will not take effect until *actual* official notice thereof is given to him.

Dismissal with ignominy.—In time of war, courts-martial have sometimes directed, in sentences of dismissal, that the same be accompanied by certain minor penalties impressing the dismissal with an *ignominious* character—such as taking away or breaking the sword of the officer, or cutting off his shoulder straps or other *insignia* of rank, publicly in presence of the command to which he is attached.

Disqualification for office.—Disqualification, either for military office or for office in general, was formerly not unfrequently imposed as a punishment, in connection commonly with dismissal, and was abundantly sanctioned by usage. In a G. C. M. O., however, of 1870, this form of penalty was expressly disapproved by the Secretary of War, and has not since been countenanced in practice as an independent punishment. As substantially amounting to an inhibition for an indefinite period upon the exercise of the appointing power in the particular case, it is a penalty scarcely within the province of a court-martial, and of at least questionable legality.

The disability to hold office, etc., attached as a conse-

quence of dismissal by Arts. 6 and 14, will be referred to in Chapter XX.

Suspension.—This punishment, though recognized in one of its forms—suspension from command—by the 101st Article of War, rests in fact upon usage for its authority. There are two principal kinds of the punishment of suspension—suspension from rank and suspension from command. The former indeed includes the latter; that is to say, a suspension of an officer from rank includes a suspension from such right of command (and exercise of authority and performance of duty incident thereto) as may be attached to his rank.

Suspension from rank involves a deprivation, during the period of the operation of the sentence, not only of the right of command but of all other rights and privileges incident to the rank, as such, of the officer, whether held in his relation to other officers or to enlisted men. Thus it deprives him of any right of promotion accruing during the term of suspension to which he would have been entitled had he not been suspended, and causes the same to accrue to the officer next junior. It renders him ineligible to sit upon a court-martial, court of inquiry, or military board, and also divests him of the right of priority and precedence in the exercise of the minor privileges of the officer, such as the privilege of the selection of quarters whenever quarters become available for selection pending the term of suspension. And so of any other right or privilege of priority, obedience, or deference which would otherwise have been due to his rank; the same, with its incidents, remaining, during the term of the suspension, dormant and inoperative.

But rights incident to his *office*, independently of rank, he may still enjoy. Thus his right to rise relatively or in files in his grade (where a senior dies, resigns, or is dismissed, retired, or promoted) is not affected by the

suspension, this being a right incident to his *office*, according to the date of his commission. So, he may continue to occupy his proper quarters (where no new selection of quarters involving him is required at his station), to purchase fuel, commissary stores, etc., from the proper officer, to draw his pay (where the same is not, in whole or in part, expressly forfeited in the sentence according to Art. 101), to receive his pecuniary or other allowances, etc.

Suspension from command merely deprives the officer of authority to exercise his proper military command (devolving it upon his junior or some other officer specially assigned to the same), and consequently of his right to give orders to, or exact obedience from, his inferiors, to convene the courts and boards which he would be empowered to convene by virtue of his command were he not suspended, to sign muster-rolls, reports, discharges, etc., as commanding officer, to appoint or reduce non-commissioned officers, to grant furloughs, make arrests, etc. It does not affect his right of promotion, or any military rights or privileges incident to rank or office or other than those attaching simply to command as such. It is thus not in general an appropriate punishment for a staff officer. It is also evidently a considerably less severe punishment than suspension from rank.

Suspension in general.—Suspension, it may be added, is not dismissal nor any degree of dismissal. It does not divest the officer of his office or commission, but only holds in abeyance the rights and functions attached to his rank or command. Though, pending the term of suspension, he is not in a legal capacity to receive or execute orders pertaining to his military speciality, he yet remains subject to such orders as may properly be given him in his official or personal character, irrespective of rank or command, as well as amenable to the

jurisdiction of a court-martial for any military offence committed during such term. The term being completed, he reverts to his former rank, as well as to his former command if not meanwhile changed by superior authority. In the interim, however, he may be restored by the pardoning power ; and his promotion by the appointing power will operate as a pardon and terminate the suspension.

Suspension is not *arrest*, and does not, *per se*, authorize a commander to subject the officer to bodily restraint.

Execution of the punishment.—Suspension, like dismissal, is executed, or rather commences to be executed, upon *notice* to the officer of the due approval of the sentence. From and after the date of the order promulgating the approved sentence if communicated to him upon its date, or the subsequent date upon which such order, or other official information of the approval, is actually personally made know to him, the term of the suspension begins, and runs on to its end.

Suspension from the Military Academy.—This is a third form of the punishment of suspension, applicable only to *cadets*. It has the effect of wholly severing the cadet from the Academy during the term adjudged. Where the suspension is for a considerable term, it is usually added in the sentence that at the end of such term the cadet shall join the next lower class.

Loss of relative rank or files.—This species of punishment also is sanctioned by the established usage of the service. It consists in subjecting the officer to lose a certain number of “files,” or “steps,” in the list, or to be placed at the bottom of the list, of officers of his rank in his regiment, arm, or corps. In resorting to the milder form of the punishment, the position on the list intended to be assigned the offender is in general specifically indicated by designating the inferior *number*

which he is in future to have, or by some such addition as—"so that his name shall appear (or be borne) on the Army Register next below (or above) that of A. B.," (a certain officer named).

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as relative right of command and of precedence on courts or boards and in choosing quarters, etc., as he would have had had he remained at his original number. It cannot, however, *per se*, affect his right to pay or allowances.

Reprimand or Admonition.—Reprimand, though enumerated in the A. R. of 1889 (par. 1019) as a punishment legal for enlisted men, is in practice almost exclusively confined to cases of officers, and is therefore here considered.

A court-martial, in imposing a reprimand, may direct that it be either *public* or *private*, according as it is contemplated that it shall be administered in public before the command or published in General Orders, or shall be given by way of personal reproof by the commanding officer in the absence of witnesses. Sentences of private reprimand, though once not unusual, are now very rare in practice. The most frequent form of the sentence is "to be reprimanded in General Orders," or "to be reprimanded" simply. The particular officer by whom the reprimand shall be pronounced, the time or place at which it shall be given, and its terms, are matters belonging to the province of the reviewing authority (or that of the officer who may be designated by him to execute the punishment), and are not properly added in the sentence of the court.

Reprimand is commonly viewed as a light penalty, and it is generally also mildly executed. But as its terms are in the discretion of the officer who administers it, these may be made pointed and severe. Some very severe reprimands, pronounced by the Secretary of War,

in approving this punishment, are to be found in the General Orders.

Admonition is but a milder form of reprimand. A sentence "to be admonished" is an indication that the court deems the offence to be one of a comparatively trivial character. To sentence an officer, convicted of a serious offence, merely to be reprimanded or admonished, would be a mockery of justice.

Punishments legal and appropriate for both officers and enlisted men.—The punishments of this class are Death, Fine, Imprisonment, and Forfeiture of pay or of pay and allowances. In adjudging the last two, the court will properly consult the code of *maximum* punishments.

Death.—It is provided in Art. 96 that—"No person shall be sentenced to suffer death except . . . in the cases *expressly mentioned*" in the code. This punishment is so mentioned: 1st, in Art. 57, and in Sec. 1343, Rev. Sts., where it is specifically *required* to be adjudged upon conviction, to the exclusion of any lesser penalty; 2d, in Arts. 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 47 (in time of war), 49, 50, 51 and 56, where it is in terms *authorized* to be inflicted at the discretion of the court. In a further Article, the 58th, this penalty, though not *named*, is yet *in effect required* to be imposed upon conviction of offences made capital by the local law. The majority, however, of these Articles are not applicable to time of peace, and the result is that, in our military law and practice, this punishment is reserved almost exclusively for the purposes of the administration of justice in time of *war*. About 550 death sentences imposed by courts-martial during the late war are published in the General Orders of the War Department alone.

A death sentence is sufficient in law which does not

specify the manner of death, but leaves that to be fixed by the reviewing authority. In practice, however, the court almost invariably indicates the form of the penalty, adjudging in general that the accused be *shot* where convicted of desertion, mutiny, or other purely military offence, and that he be *hung* where convicted of a crime other than military, as murder or the offence of the spy.

It is required by Art. 96 that two-thirds of the members of the court shall concur in a death sentence. It has hence become *usual*, though it is not *essential*, for the court to add to such sentence, "two-thirds of the members present concurring," or in terms to such effect.

Execution of the punishment.—The mode of the execution of this punishment is not prescribed by statute or regulation. According to the general usage, where the same is to be inflicted by *shooting*, the prisoner, accompanied by the chaplain, is conducted by a detachment, including a firing party and coffin bearers, and headed by the provost marshal or other officer, and band playing the Dead March, to an open space on three sides of which the command is formed facing inwards. The prisoner being placed, the charge, finding, sentence and orders are read aloud. The firing is directed by the officer, and, the execution being completed, the command breaks into column and marches past the body. In a case of *hanging*, the command is "formed in square on the gallows as a centre," and, after similar preliminaries, an "executioner," under the direction of the officer in charge, "performs his office."

Fine.—This punishment is legally impossible whenever the punishment is discretionary with the court, but is especially appropriate to those offences which consist in a misappropriation or misapplication of public funds or property, being in general adjudged with a view mainly to the reimbursement of the United States for

some amount illegally diverted to private purposes. It is indeed specifically designated by Art. 60 as a penalty suitable for embezzlement and other frauds upon the government.

Fine and imprisonment.—In the military, as in the civil, procedure, where a fine is imposed, it commonly is, and in general properly should be, added in the judgment, with a view to securing the execution of the fine, that the party shall be imprisoned till the fine is paid. Further, it is usual and proper in a military sentence to declare that such an imprisonment shall not exceed a certain term of months or years; otherwise, the pardoning power not intervening, the confinement might be indefinitely prolonged. When the imprisonment is intended to be inflicted for a separate purpose of additional punishment, as well as with a view to induce the payment of the fine, the form commonly adopted is to adjudge it for a certain period absolutely, and for such further period as the fine may remain unpaid; the latter period, however, not to exceed a certain term specified, or the whole not to exceed a certain term in all.

Imprisonment.—This punishment, indifferently also styled “confinement,” is, where adjudged to *officers*, almost invariably combined with dismissal. Where adjudged to *non-commissioned officers*, it is properly accompanied, in the sentence, with reduction to the ranks.

There are five species of this punishment now recognized in military law: Simple confinement; Confinement at hard labor; Confinement in a penitentiary; Solitary confinement; Confinement on bread and water diet. The two latter, however, are by usage (as expressed in par. 1019, Army Regulations of 1889) reserved for enlisted men alone, and will be considered among the punishments appropriate to that class.

Simple confinement is either confinement in a guard-house, imposed for slight offences; or confinement, (without hard labor) in a military prison—such as that established by military order on Alcatraz Island in the harbor of San Francisco. Confinement at the Military Prison established by Act of Congress at Leavenworth, Kansas, involved *per se* hard labor, or some labor, under the provisions of Sec. 1351, R. S.

“*Hard labor*” is really a distinct punishment, and has formerly, in some instances, been adjudged alone—*i. e.*, unaccompanied, in the sentence, by confinement. It necessarily implies, however, *per se*, a restraint of the person, and is now never imposed except in connection with confinement;—“*to be confined*” (or “*imprisoned*”) “*at hard labor*,” at a prison named, for a certain specified term, being the customary form of the sentence. Hard labor, being a separate penalty, must be expressed in terms in the sentence, or it cannot be administered,—except where involved in the peculiar species of punishment adjudged, as in the case of confinement in a penitentiary or, as above noted, at the Leavenworth prison.

Confinement in a penitentiary.—This form of imprisonment, as impossible by court-martial, is regulated by the 97th Article of War, as follows: “*No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.*” That is to say, a court-martial is authorized to adjudge this penalty only upon a conviction of an offence of a *civil* nature, cognizable by such court—as embezzlement, larceny, robbery, homicide, or

other crime properly so cognizable under Art. 60 or 62, or, in time of war, under Art. 58—and which is also punishable under the local criminal law. For a purely military offence, as desertion, mutiny, misbehavior before the enemy, etc., this punishment cannot legally be imposed.

By the term "*penitentiary*," as used in the Article, is understood any public civil prison—as the U. S. penitentiary established at Leavenworth, Kansas, by the Act of March 2, 1895, the U. S. penitentiary in the District of Columbia, or the prisons "erected by the United States" in the several Territories, or those established by the laws of the different States—in which prisoners are subjected to a course of discipline and labor. A sentence of confinement in a penitentiary is one in which the penalty of "hard labor" is necessarily involved, and in which, therefore, it need not be added in terms.

Term of imprisonment.—The *maximum* term of the punishment of imprisonment, in cases of the various offences of *enlisted men*, has, as already noticed, been fixed by the President under the authority of the Act of Sept. 27, 1890. (See G. O. 16 of 1898, in Appendix.) In the case of *officers* (where indeed such penalty is much more rarely resorted to), no *maximum* or *minimum* term (except inferentially under Art. 58) has been established for this punishment, whether executed in a military prison or a penitentiary.

Imprisonment after discharge or expiration of term of enlistment.—It is now settled law that a military offender may be sentenced to an imprisonment continuing after he has been discharged—*i.e.* that he may be sentenced to be dishonorably discharged, and then imprisoned for a certain term. It is equally settled that a court-martial may legally sentence a soldier to a term of imprisonment which must necessarily extend beyond the period of his existing term of enlistment.

Cumulative sentence.—Where two sentences imposing terms of imprisonment are, on successive trials, adjudged the same offender, the second is cumulative, and may be, and—legally—is, fully executed upon the expiration of the term of the first.

X *Credit for good conduct in confinement.*—This indulgence granted to civil prisoners of the United States by an Act of Congress of 1875 is extended to military prisoners by par. 915, A. R. It consists in allowing to a prisoner a deduction, from the term of his sentence, of *five days* for each period of twenty-five days during the whole of which his conduct has been good.

Forfeiture of pay, or pay and allowances.—Forfeiture of *pay*, which, in cases of soldiers, is the most frequent of all the military punishments, is to be distinguished from *fine*—a punishment which imposes a pecuniary liability in general, not necessarily affecting pay; and also from *stoppage*, which is not properly a punishment at all but a charge on account, though sometimes indeed resulting from punishment as a mode adopted for executing the same.

There are several different forms of forfeiture adjudged by sentence—as, for example, a forfeiture of a certain specified amount (as so many dollars) of pay, or of the pay for a certain specified period, or of “all pay due,” or “all pay due and to become due.”

Forfeiture of “allowances.”—The forfeiture may include “allowances” with pay, though a forfeiture of “pay” alone will not embrace allowances. A forfeiture of “pay and allowances” affects, with his pay, any money commutations, extra pay,* or other pecuniary emoluments incidental to the office, rank, or *status* of the party and due him at the date on which the sentence takes effect—as the allowance for quarters in the case of an officer,

* Not payable in time of war. (Act of April 26, 1898.)

and the allowance for clothing in the case of a soldier. A forfeiture of allowances other than pecuniary—as of rations or clothing as such,—would not now be sanctioned by the usage of the service.

The forfeiture must be in express terms, not left to inference.—A forfeiture, to be operative, must be expressed; it cannot be involved in any other penalty. A simple sentence of death, dismissal, dishonorable discharge, or imprisonment, cannot affect the right of the party to such pay as may be due him at the date of the approval or execution of such sentence. Where, therefore, the court intends to forfeit pay, it must express its intention in terms: pay cannot be forfeited by implication.

The forfeiture accrues to the United States only.—The principle has been heretofore noticed that a court-martial can neither forfeit pay for the benefit of an individual, nor by its sentence direct as to its disposition. All forfeitures of pay accrue to the United States, and the disposition of the same as public funds is a matter belonging to the province of Congress.

Punishments legal and appropriate for enlisted men only.—These are Reduction, Dishonorable Discharge, Solitary Confinement, Confinement on bread and water diet, Ball and chain, and Detaining pay.*

Reduction.—This punishment, commonly termed reduction to the ranks, consists, in our service, in the degrading of a non-commissioned officer—sergeant or corporal of a company—to the rank and status of a private. Reducing to an intermediate grade, as from sergeant to corporal, is not known to our law; nor is reduction of commissioned officers. Reduction should always be added in a sentence which imposes a term of confinement.

* See page 186, note.

In some cases reduction has been made ignominious—*i.e.* has been directed in the sentence to be accompanied by the cutting off, in the presence of the command, of the chevrons and stripes of the non-commissioned officer.

Reduction by sentence as a *punishment* is to be distinguished from the reduction authorized by the Army Regulations (par. 261)—*viz.*, that which may be ordered by the commander of a regiment on the application of a company commander.

Dishonorable discharge.—This punishment corresponds to dismissal in the case of an officer, in that it expels the offender with disgrace from the Army, and remands him to the status of a civilian. It is frequently added in sentences of imprisonment; the interests of the service requiring that a military convict, before being subjected to a protracted confinement, should be formally separated from the Army.* It is to be distinguished from the discharge given by executive order as authorized by Art. 4, the latter being, not a *punishment*, but a mere rescinding or discontinuance of a contract.

Execution of the punishment.—This punishment is executed by the delivery to the soldier of a certificate or “discharge in writing,” which, as required by the 4th Article of War, must be “*signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present.*” The discharge will be worded according to the usual form of discharges as furnished from the Adjutant General’s Office, but the blank in the body of the certificate, for the insertion of the cause or occasion of discharge, will be filled by a statement to the effect that the same has been given in consequence of the sentence of a general court-martial

* A dishonorably discharged prisoner, at the end of his term of confinement, receives a suit of clothing. (Act of March 16, 1896.) Also a donation of five dollars. (Act of July 7, 1896.)

published in a certain General Order, describing it by the command or authority from which it has proceeded, its number and date. Such statement will show that the discharge was awarded as a *punishment* and is therefore *dishonorable* in law.

Discharge with ignominy.—A mode of dishonorable discharge, sanctioned by usage for time of war, is *drumming* (or bugling) *out of the service*, with the “Rogue’s March,” in the presence of the command.

Solitary confinement.—The usage of the service (as recognized and expressed in par. 1019 of the Army Regulations of 1889) is the authority for this form of imprisonment. In par. 1021 (Id.) it was specified that the same “shall not exceed fourteen days at a time, nor be again enforced until a period of fourteen days has elapsed. Nor shall such confinement exceed eighty-four days in any one year.” [And see now G. O. 16 of 1898.] The term, therefore, of this confinement can in no case legally transcend the limit here fixed, nor can it properly transcend for any period the *proportion* indicated.

Confinement on bread and water diet.—This, which was specified in par. 1019, A. R. of 1889, as among the legal punishments for soldiers, is now rare in practice. Where resorted to, it has generally been adjudged in connection with solitary confinement, and the Regulations (par. 1021, Id.) prescribed for it the same limits as to duration.

Ball and chain.—In practice this punishment has generally consisted in the having attached to the ankle a chain from 3 to 6 feet in length, linked to a ball weighing about 24 pounds. “Ball and chain” was recognized as legal by the Army Regulations (par. 1019) of 1889, but, though frequently imposed during the late war, is now comparatively disused. It should, properly, be reserved

for cases of violent persons, or cases where attempts to escape are to be apprehended and the offender cannot otherwise be effectually secured.

Detaining pay.—A new, light, punishment, intended to promote discipline by restraining soldiers inclined to excesses, was inaugurated by G. O. 63 of 1889, which provides that—"upon conviction of offences punishable at the discretion of courts-martial, a soldier may be sentenced to have his monthly pay, or a stated portion thereof, *detained* from him for such periods as the court, subject to the restrictions of the 83d Article of War, may direct;" the amounts so detained to be restored and paid to the soldier on his discharge, unless (Circ. 1, H. Q. A., of 1890) meantime divested by a sentence of *forfeiture*.*

Prohibited and disused punishments.—The punishments of *flogging*, of *branding*, and of *marking* or *tattooing*, once recognized as legal, are now, as we have seen, prohibited by the 98th Article of War; the prohibition of branding, etc., being (apparently inadvertently) repeated in Art. 38. Certain other punishments, such as carrying weights, standing on a barrel, placarding, etc., though not unfrequent during the late war, are now disused in practice.

5. Remarks with sentence, and Recommendation—*Remarks with sentence.*—In connection with its sentence, as with its finding, a court-martial may present such animadversions, recommendations, explanations, or other remarks, as it may deem properly to be called for. Thus it may comment unfavorably upon the accuser or prosecutor; may recommend that an officer or soldier (other than the accused) compromised by the evidence be brought to trial; may reflect upon certain action, discipline, or want of discipline,

* The punishment of *detention of pay* has been abrogated by G. O. 25 of July 19, 1894. Since it may possibly be revived, the mention of it has not been omitted from the text.

developed by the testimony, etc. It is not uncommon for a court, in adjudging an unusually mild sentence, to add that it is "thus lenient" on account of certain circumstances mentioned—as that the accused has undergone a long confinement in arrest before trial, or has borne a good character or rendered valuable services prior to his offence, or has voluntarily surrendered himself from desertion, or has been captured and imprisoned by the enemy, or is young or inexperienced as a soldier, or physically or mentally deficient, etc.

Recommendation.—Where a severe sentence, made imperative by a mandatory provision of the code, has been adjudged by the court, or—though more rarely—where a severe discretionary sentence has been imposed, the members, or a portion of them, sometimes join in a *recommendation*, i.e. a written statement commending the accused, for reasons stated, to the clemency of the reviewing authority. This statement is not a proceeding of the court, and no part of the record of the trial. It is therefore not properly incorporated with or added to the sentence, but, in practice, is usually appended to the record as a separate paper.

Being the act not of the court, but of the members who take part in it, the recommendation may be subscribed by all the members, or by a majority or minority, or by one member only. There may be two or more recommendations, signed by different members, and on different expressed grounds. The judge advocate may properly join in a recommendation.

A recommendation should not omit to state the reasons upon which it is based. Among the grounds generally advanced have been—the previous military services of the offender, his general good character, his youth or inexperience, the fact that he has been held

for an unusual period in arrest or confinement awaiting trial, or that he is in infirm health, the fact that he has promptly made good such losses as were occasioned to individuals by his derelictions, the absence in his case of a deliberate criminal intent, etc. A recommendation should proceed upon *facts*—mainly or entirely upon facts in evidence on the trial.

CHAPTER XVII.

ACTION ON THE PROCEEDINGS—THE REVIEWING
AUTHORITY.

It is essential to the taking effect of the sentence or finding of a general court-martial that it shall be acted upon by the proper superior, commonly designated the "Reviewing Officer" or "Reviewing Authority." This official—who is either the President, a Commanding General, or the Superintendent of the Military Academy—may approve or disapprove the sentence or proceedings, execute the sentence, pardon or mitigate the punishment, and exercise certain other authority incidental to these powers. In cases in which the President's action is required, in confirmation of the previous action and approval of a military commander, there are *two* reviewing officers.

The revisory powers here indicated are conferred, and their exercise is regulated, by Arts. 104 to 112 of the code, and Sec. 1326, R. S.

The subject of this Chapter will be considered under the heads of—1. Action of President as reviewing authority; 2. Action of military commander as reviewing authority; 3. Return of the proceedings for correction; 4. Execution of sentence; 5. Pardon and mitigation of punishment; 6. Formulating of action, and promulgation; 7. Disposition of records.

1. Action of President as reviewing authority.—The President acts as reviewing officer—1st. In all cases in which he has *himself convened the court*. In such cases he is the sole reviewing authority, the only official empowered to approve, disapprove, mitigate, or otherwise act upon the sentence or proceedings. If a President ceases to hold office before the proceedings or sentence of a certain court ordered by him are approved or acted upon, his successor in office becomes the reviewing authority: 2d. In the cases of the particular sentences which, as it is prescribed in certain Articles, shall not be carried into execution until *confirmed* by him—*viz.*, all *death sentences* adjudged in time of peace and certain death sentences adjudged in war, as indicated in Art. 105; all *sentences of dismissal* of officers adjudged in time of peace, as indicated in Art. 106; all *sentences "respecting general officers,"* whether adjudged in peace or war, as indicated in Art. 108; and all sentences of suspension and dismissal of *cadets*, as indicated in Sec. 1326, R. S.: 3d. In cases arising in time of war under Art. 111, where the original reviewing officer, instead of executing a sentence of death or dismissal which he is authorized to execute, *suspends* his action thereon, and refers the question of execution to the determination of the President.

The action of the President as reviewing officer need not be attested by his signature. As recently held by the Supreme Court in *U. S. v. Page*,* it is sufficient that such action be subscribed by the Secretary of War, provided it clearly appear therefrom that the proceedings were duly submitted to the President and thus that the approval was really his act.

* 137 U. S., 678.

2. Action of military commander as reviewing authority.—By Art. 104, the sentences or proceedings of all courts-martial ordered by military commanders are required to be *approved* by the convening commander (or his successor in office) as a prerequisite to their taking effect. In most cases such approval is the only prerequisite. In some cases, as has been seen, the President must also give his approval before the sentence can be executed. Where the President thus acts, his action is commonly termed *confirmation*, in contra-distinction to that of the commander which is termed *approval*. Where two military commanders, an inferior and a superior, are required to approve a sentence (as is the case in some instances occurring in time of war, indicated in Arts. 105 and 107), their respective official action is similarly designated. The two terms “approval” and “confirmation,” however, are often indifferently employed in practice, and there is no substantial distinction in legal signification between them.

Nature of approval.—The term “approval” or “approved” is a technical one, designating the official acceptance of and concurrence in the proceedings or sentence by the reviewing officer. When a commander *approves* a sentence or finding he does not necessarily mean that it has his personal approbation, for the reverse may be the fact. He means simply that for purposes of justice or discipline, or from motives of expediency or otherwise, he sanctions and effectuates it officially. In exceptional cases reviewing officers, in acting upon a sentence, have declared of the same that it was “confirmed but not approved,” the intent being to impart the mere official assent necessary in law to the execution of the sentence while withholding personal approbation of the same or of the proceedings or

findings upon which it is based. Such a distinction, however, in giving to the two words the one a technical and the other a colloquial meaning, is a departure from established usage and without legal significance, and the effect of the form in law is merely that of an approval. The proper course where a commander determines to ratify a sentence which he cannot commend is simply to approve officially and then add such remarks as may be pertinent to explain or illustrate such action.

The approval being an official act must be made and subscribed by the convening commander. He cannot *delegate* this function to another officer—as a staff officer or inferior commander; and if he does so the act of the latter will be of no legal virtue. The commander must also be *in command* at the time in order to legally approve. If he has been *detached*, although but temporarily, from his command he cannot, while detached, legally act as reviewing officer of the proceedings of courts previously convened by him.

Where the commander who has convened the court dies or is relieved or otherwise separated from his command before the proceedings come to be acted upon, the power and duty of approval or other action is devolved upon his successor in command, or, as it is expressed in Article 104, “*the officer commanding for the time being.*”

Disapproval—Its nature and effect.—“Disapproval,” in military law, as applied to the *sentence*, is not a mere expression of disapprobation, but a technical term employed to indicate the action of the reviewing officer where he does *not approve* the sentence or a punishment. Such officer, wherever authorized to approve, may, instead, disapprove; disapproval being simply the absence or withholding, stated in terms, of the approval or confirmation which is necessary to the taking effect of the

judgment of the court. As approval or confirmation vitalizes and makes operative the sentence or a punishment, disapproval nullifies and vacates it. Like approval, it may be full or partial, *i.e.*, where a sentence imposes several punishments, one or more may be disapproved, and the other or others approved; the disapproval of a part not affecting the validity or execution of the remainder. Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory: there then remains no material upon which the original reviewing officer, or the President, or other superior authority whose confirmation would be necessary to the enforcement of the sentence, can exercise the power of execution, or that of pardon or mitigation, and the legal status of the accused is the same as if the trial had resulted in an acquittal.

A disapproval of the sentence may be based upon any ground going to the legal validity of the proceedings, or to the justice or expediency of the judgment of the court. Where the court has merely committed an error capable of correction, the proper course usually is not to disapprove the sentence, but to return the proceedings to the court for revision and correction—a form presently to be noticed.

New trial upon disapproval.—In disapproving a sentence the reviewing officer is authorized, in his discretion, to grant to the accused a new trial if he *applies* for the same; such application operating also as a *waiver* of objection to a second trial for the same offence. Such new trials, however, have been of very rare occurrence in our military practice; parties convicted and sentenced being in general satisfied that the proceedings in their cases should be terminated by the disapproval, on whatever ground the same may be based.

Form of disapproval not affecting the sentence.—The

disapproval thus far considered is a disapproval in whole or in part of the *sentence*. The reviewing officer, however, may, and in practice often does, exercise the authority of disapproval as to some portion or portions of the proceedings not essential to support the sentence; such disapproval not being a technical or determinate legal act like the other, but an expression of disapprobation or difference of opinion on the part of the commander. But this form of unfavorable comment (unless applied to some action of the court terminating for the time the proceedings, as the sustaining finally of a special plea) is entirely consistent with an approval of the sentence or of a punishment ultimately adjudged.

3. Return of the proceedings for correction.—*Nature of the authority.*—Incident to the discretion vested by the code in the Reviewing Officer (whether military commander or President) to approve or otherwise act upon the proceedings and sentence, is the authority to reassemble the court for the correction of any error or errors appearing in the record, and capable of correction, before final action be taken on the case. This authority is fully established by military usage and is recognized in the A. R. (paragraph 957). It is evidently only by the return of the record to the court that the correction can legally be procured to be made, since the reviewing officer cannot make it himself independently of the court, nor can the court, after it has once completed and forwarded to him the record, recall it for modification.

Occasions and grounds for the exercise of the authority.—These may be: 1. *Clerical omissions or mistakes* in material formal particulars in the making up of the record; 2. *Errors of law or fact, or of judgment or discretion*, on the part of the court, in its rulings or conclusions. Whether the defect be occasioned by in-

advertence, or arise from a misconception of law or military usage, or from an imperfect logic or a misuse of the judicial faculty, it is of course most desirable that it be removed, if practicable, from the proceedings, and the due and rational course of justice be relieved from obstruction and embarrassment. This is particularly to be desired where there has been a *conviction*, since, in the absence of the correction, the sentence may not legally be capable of execution or for other reason may properly have to be disapproved.

Errors which cannot be corrected.—But radical fatal defects, rendering the proceedings wholly illegal from the beginning, cannot be corrected by this proceeding. Nor of course can an error be corrected where the *facts* do not warrant the correction. Nor can the record be returned on account of an error which can be corrected only by means of the introduction of *testimony*. The object of the proceeding is not to reopen an investigation which has been closed or rehear a case once tried and brought to judgment, but simply to revise what has been judicially completed. Thus no evidence whatever can be received or heard at this stage.

Course of procedure.—The reviewing officer returns the record to the court, generally through the judge advocate or president, with an order or official communication requiring it to reassemble in the case and reconsider the proceedings, or the findings or sentence, with the view of making a certain indicated correction (or corrections) therein. Where the alleged error is simply clerical or formal, it is commonly sufficient merely to specify it. In an instance of a supposed error of law or opinion in the verdict or award of punishment, a brief statement of the reasons deemed to call for the amendment is usually added, or referred to as contained in an accompanying indorsement or report.

Upon reassembling, the court may proceed to business if only a quorum of five members be present, though a larger number was in fact present when the supposed error was committed. The situation is commonly the same as if the court were *closed* for deliberation; the accused, therefore, is not in general properly present. The court having considered the order, etc., proceeds to make the correction suggested, provided it regards the same as proper to be made, and thereupon returns the record and revision to the reviewing officer. The correction cannot be made by addition, erasure, or otherwise, on the page or part of the written record in which it occurs, but must be made as part of the proceedings on the revision, to wit, on a separate sheet or sheets attached at the end of the record, and as a separate and distinct action of the court. This supplement to the record, which should be as formal as the main record itself, should set forth the reconvening order and all the proceedings had thereunder. The action taken must be the act of the court as such: neither the president or other member, nor the judge advocate, can personally assume to make the correction.

If the correction is not made, *i.e.*, if the court decides that there is no error calling for correction, it will similarly record its action to this effect (stating, if it think proper, its reasons), and return the record, as supplemented, to the reviewing officer. The latter may thereupon again call upon the court to make the correction, while at the same time replying to or commenting upon the reasons or action of the court. The court may then adopt the view of the commander as to the correction, or it may adhere to its original determination, adding such arguments or observations as it may see fit. There is in our military practice no limit to the number of times that a record may be returned for correction,

but it is not often that the same is in fact returned a second time after the court once decides not to make the amendment. Upon such conclusion the Reviewing Officer (unless convinced that the court is in the right in the matter) will commonly dispose of the case with an expression of disapproval of its action on the revision, as also, in general, of the sentence, finding, or other proceeding in respect to which the desired correction has been declined to be made. If, however, the error does not affect the validity of the sentence, he may, while disapproving the conclusion of the court, approve the sentence rather than that the offender go unpunished.

4. Execution of sentence.—The general law authorizing the execution of sentences is contained in the 109th Article of War. The effect of this Article is, that the sentence may be executed or caused to be executed by the officer who ordered the court and has approved the sentence (or his successor in command), in all cases except those in which the President, by Art. 105, 106, or 108, or Sec. 1326, R. S., or a superior commander, by Art. 105 or 107, is required finally to confirm the sentence; and that, in the excepted cases, the order for the execution shall proceed from the President or such superior. Reference has already been made to Art. 111 under which, in time of war, the convening officer may elect to *suspend* the execution of certain sentences and refer them to the President for final action.

Punishments not to be added to, in execution.—In approving a sentence, the reviewing officer may reduce it by mitigation, or commute it, but he cannot legally add to it. Thus, in approving a sentence of simple dismissal of an officer, he cannot order that the officer forfeit his pay due at the time of dismissal; nor, in approving a sentence of simple imprisonment of a soldier, can he order that the same shall be executed with hard labor.

Nor, after the execution of a punishment has been entered upon, can he legally impose upon the accused any penalty additional to that adjudged and approved.

Conclusive effect of an executed sentence.—A sentence once duly approved and fully executed is conclusive and final so far as regards the action of the reviewing authority. He cannot recall the action taken, or reopen the case, or revoke, set aside, rescind, or modify the sentence. An executed sentence is also wholly beyond the reach of the general pardoning power, as well as of the power of remission and mitigation conferred by the 112th Article of War, yet to be noticed. Thus, for the rehabilitation or relief of the party sentenced, some new act quite outside of the powers of revision and pardon must be resorted to. An officer, for example, duly dismissed the service by sentence of court-martial cannot be restored to the army by an attempted revoking of the confirmation or setting aside of the sentence, or by a pardon or remission, but can be so restored only by a new appointment made by the President and confirmed by the Senate. On the other hand, an officer or soldier who has been condemned by an executed sentence to forfeit or pay to the United States a sum of money, can be relieved from or reimbursed for such payment, only by an act of legislation in his behalf on the part of Congress.

5. Pardon and mitigation of punishment.—*Exercise of the pardoning power by the President.*—The President, where he is reviewing Officer, *viz.*, when acting upon the sentence of a court convened by himself, or a sentence requiring his confirmation, while he may, of course, exert the plenary power vested in him by the Constitution, in practice almost invariably exercises a partial pardoning power of *remission of the punishment* analogous to that conferred upon commanders by Art. 112. In *other* military cases,—as

in cases of applications or appeals addressed to him for clemency by officers or soldiers, whose sentences have been previously finally acted upon by the competent military commander and who are undergoing the same, —here, where he acts not as reviewing officer but as constitutional pardoning power, he exercises a full or limited measure of such power according to circumstances.

Authority conferred by Art. 112.—This Article enacts as follows: “*Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer.*” The power here given is, not the plenary power to pardon an offender which is reserved to the President under the Constitution, but the power to pardon a *punishment* merely, that is to say, a power of *remission*. The exercise of this limited power simply relieves the accused in whole or in part from the punishment, leaving the matter of his guilt quite unaffected in law. Remission, however, is pardon of an inferior degree, the power to pardon including the power to remit. The attributes, therefore, of the constitutional pardoning power of the President will be found to characterize in a measure the power of remission possessed by reviewing officers, who, indeed, in the exercise of this power, may be regarded as the agents or representatives of the Executive in military cases.

Attributes of the power of pardon or remission.—1. It is coextensive with the punishment. Thus its exercise is not restricted to the time and occasion of the formal approval of the sentence by the reviewing authority, but may be resorted to at any stage of the execution of the punishment, and so long as any portion of the same remains unexecuted. What remains, for example, of a term of imprisonment of a soldier may be remitted, at

any time before its expiration, by the commander who originally ordered the court and approved the sentence, or by his successor meanwhile in the command, provided, of course, the soldier is still confined within the command. So a *continuing* punishment—as one of disqualification to hold office or of a loss of files—may be remitted at any time during its legal duration. 2. It may be full or partial. That is to say, where a sentence includes several punishments, the President, or a commander thereto authorized by Art. 112, may remit all, or one or more; and a remission of one will not affect the authority to execute or interrupt the execution of another or the others. So a part of a punishment may be remitted at one time and another part at a subsequent time. 3. It may be extended to a *class* of persons. The power is not restricted to the pardoning or remitting of the punishment of a single individual at a time. Thus the President has, on several occasions, offered amnesty to *deserters* who may return to duty within a time specified. This instance indeed illustrates another attribute of the power under consideration, *viz.*, that it may be exercised prior to the conviction or trial of the offender. 4. It may either be unqualified or conditional. A pardon or remission, while in practice generally unqualified, may also be *conditional*, and the condition may be *precedent* or *subsequent*. During the period of the late war pardons on express conditions were not unfrequent in military cases. Thus sentences were remitted on the conditions precedent—that the accused re-enlisted, or enlisted “during the war;” that he paid back certain bounty money received by him; that he paid a fine, or part of a fine imposed by his sentence; that he turned over the company fund in his hands; that he made good an amount found to have been embezzled by him; that he

reimbursed the expenses incurred in his apprehension as a deserter, or the value of public property (as a horse, carbine, etc.) appropriated in deserting, or that he made good the time lost by his absence; that he allotted certain pay sentenced to be forfeited, or other pay, to the support of his family. So, though more rarely, military pardons have been granted on express conditions *subsequent*. As where an officer was pardoned on condition of his resigning his commission. So, where the sentences of soldiers in confinement were remitted on condition that they faithfully served their full terms of enlistment. Where the pardon is conditional, the condition must be *accepted* by the beneficiary: in military cases the acceptance is commonly indicated, not formally, but by his voluntarily submitting to the proceeding or performing the act required as a condition. As has been remarked by the court in a leading case—"It lies upon the grantee to perform the condition. If he does not,—in case of a condition precedent the pardon does not take effect, and in case of a condition subsequent the pardon becomes null; and if the condition is not performed the original sentence remains in full vigor and may be carried into effect."

Commutation.—A familiar form of conditional pardon or remission is commutation. It applies especially to certain punishments not capable of being mitigated, *i.e.*, reduced in amount or quantity, and from which, therefore, a sentenced person can be relieved only by the *substitution* of other and different punishments of a milder character. Death, for example, which cannot be mitigated, may be commuted to dismissal or to life* or other imprisonment. So dismissal, which is not susceptible of mitigation, may be commuted to suspension, loss of files, etc. So in a case of an enlisted man, a sentence of dis-

* See recent case in G. O. 187 of 1898.

honorable discharge or reduction to the ranks may be commuted to a moderate forfeiture of pay.

Commutation, however, though more appropriate to cases of punishments which do not admit of mitigation, is not restricted to these in its application. It thus may be resorted to in cases where mitigation is permissible and in lieu thereof. Thus a considerable term of imprisonment, instead of being mitigated to a less term, may be commuted to a forfeiture of a small amount of pay.

Commutation is thus seen to be, in law, a pardon of the punishment on the *condition subsequent* that the party receive and undergo a less severe punishment of a different nature,—a condition which, in military cases, is accepted, not in express terms, but constructively by the party's entering upon and duly undergoing the substituted penalty.

Mitigation.—Mitigation differs from commutation in that it consists, not in changing the quality of the punishment or in substituting a different punishment for it, but simply in reducing it in quantity. Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term; a fine or forfeiture of a certain amount, by reducing it to one of a less amount; a loss of a certain number of fies, by reducing it to one of a fewer number. Pardon and mitigation, though separate functions, may concur in action. Thus where a sentence imposes forfeiture and imprisonment, the reviewing authority may at the same time remit the forfeiture and mitigate the imprisonment, or *vice versa*.

As already noticed, the power conferred by Art. 112 is to mitigate, etc., a "*punishment*," not the *sentence*. So, where a sentence contains several punishments, action taken thereon which detracts from the severity of the

sentence in the aggregate but does not specifically reduce any punishment as such, is not a legal exercise of the power of mitigation.

Grounds of pardon or mitigation.—These are numerous, and vary with the circumstances of the cases tried. Among the most common are—the good character or record of the accused in the service; the fact that he was held an unreasonable time in arrest or confinement before trial, or while awaiting action on his sentence; that he is a recruit or young and inexperienced, or a foreigner with an imperfect understanding of English; that the punishment is too severe for his offence; that the offence was not characterized by premeditation or criminal purpose; that he has made good to the United States or individuals the losses incurred by his misconduct; that, as a deserter, he voluntarily returned or surrendered himself; that his offence was induced or aggravated by harsh treatment or unjustifiable conduct on the part of a superior; that it was attended by special circumstances of provocation or extenuation, etc.

6. Formulating of action, and promulgation—*Statement of approval, etc.*—It is directed in the Army Regulations, par. 955, that the reviewing authority “will state at the end of the proceedings in each case his decision and orders” thereon; but no *form* for the statement of the action of such authority is prescribed in the military code. Usage, however, has indicated a form for the purpose which is in general substantially followed. This form (given in the Appendix) consists of an official statement appended to the record (with a proper heading, designating the headquarters, etc., place and date), to the effect that the proceedings, findings and sentence in the case of—(naming the accused)—are approved or disapproved, in whole or in part; or that the proceedings and findings are approved in

whole or in part, and the sentence, punishment or punishments, is or are remitted, commuted or mitigated, as the case may be; with a direction as to the disposition of the prisoner in case of conviction, designation of the place of confinement if imprisonment be adjudged, etc. In a case of a sentence imposing a reprimand, to be administered by the reviewing officer, the formal administering of the reprimand is added in terms to the approval. If the case is the only or the last one to be tried by the court, the statement generally concludes with an order dissolving the court. The completed action is subscribed by the reviewing officer in his official capacity.

Where the sentence is one requiring the final action of a superior, as the President, the statement, after the formal approval, adds—"and the proceedings are hereby forwarded for the action of the President," etc., or in terms to such effect.

Where the action authorized by Art. 111 is resorted to, the statement, after the approval, proceeds to add what is referred to in the Article as the "order of suspension," which is simply a declaration to the effect that the execution of the sentence is suspended until the pleasure of the President shall be known, and that the proceedings are accordingly transmitted to him for his action, under the Article.

Accompanying remarks.—To the *formal* action or orders thus indicated, the commander or President may, if he thinks proper, add such reflections upon the proceedings or conclusions of the court, the conduct of the prosecution or defence, the make-up of the record, etc., as the facts may warrant. Such comments have the more frequently been resorted to where the finding, or sentence, etc., has been in whole or in part *disapproved*. Where indeed the subject of the unfavorable criticism is an error of the court, capable of being corrected by the return of


the proceedings for the purpose, it is but fair to the court, and is in the interests of justice, that this course should first be pursued.

The Order of promulgation.—The form of the General Order in and by which the President or commander promulgates his action upon the proceedings of a case tried, is quite familiar to the service. This Order is not an original paper, but a copy of certain particulars contained in the record and of the formal action appended thereto. It is thus not essential to the execution of the sentence or otherwise, and may be wholly dispensed with. It has become, however, an invariable form, and is mainly useful—1st, as a publication to the Army of the result of the trial, and of the opinion of the commanding general, and (where his action is required) that of the President, upon the proceedings; 2d, as forming a permanent and convenient memorandum of the more material particulars of the case, for general reference and use in evidence; 3d, as constituting actual or presumptive *legal notice* to the accused of the sentence or other conclusion of the court, and of the approval, disapproval, remission or mitigation by the reviewing authority. It also, by its *date*, where identical—as it should be—with the date of the formal approval, fixes the day from which in many cases, and always in cases of imprisonment, the punishment begins to be executed in law.

Special action in case of an acquittal.—In such a case, if there is likely to be any material delay in the issuing of the Order promulgating the proceedings, the commander properly may, and in practice not unfrequently does, direct that the accused be forthwith released from arrest and restored to duty. In the absence of such anticipatory action, an officer or soldier fully exculpated on his trial might be held in undeserved restraint, and subjected to unnecessary suffering or humiliation, for a con-

siderable period, while awaiting the publication of the formal Order.

7. Disposition of records.—Par. 892, A. R., directs that the proceedings of all general courts-martial “will be forwarded direct to the Judge Advocate General.” The last duty of the military reviewing officer, after fully acting upon the proceedings of a general court, thus is to forward the record to Washington, to the Judge Advocate General of the Army, who is made by statute the legal recipient and custodian of such proceedings. A copy of the order of promulgation, if any has been issued, is properly transmitted with the record.



CHAPTER XVIII.

INFERIOR COURTS-MARTIAL.

3 As mentioned in Chapter IV, there are known to our law ~~four~~ Inferior Courts-Martial, viz.: 1. The Regimental Court-Martial; 2. The Garrison Court-Martial; 3. ~~The Field Officer's Court~~;^{*} 4. The Summary Court. The two former date, in our military law, from 1775; ~~the third had its inception in 1862~~; the last is of recent origin.

1. The Regimental Court-Martial.—*Its authority and nature.*—The authority for this court is contained in the 81st Article of War, by which “*Every officer commanding a regiment or corps*” is made “*competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offences not capital.*”

The term “regiment” need not be defined. The term “corps” signifies a separate integral portion of the army (other than a regiment) “organized by law with a head and members.” It must be complete within and of itself, not a body made up of detachments from different commands temporarily acting together. Further, it must contain not only a force of soldiers enlisted for or incorporated in it, but also officers appointed or assigned in or to it who may compose the court contemplated by the Article. The Corps of Engineers (including the Engineer battalion); the command (of ordnance officers and enlisted men) of the Chief of Ordnance; and the

^{*} Now (1899) abolished. (See *post.*)

present Signal Corps, under the command of the Chief Signal Officer—are all “corps” in the sense of this Article. But the Corps of Cadets of the Military Academy is not such a “corps” because it comprises no commissioned officers of the Army and thus no material out of which its commander could compose a court for it as a “corps.” A court for a “corps” might properly be called a “corps court:” the term “regimental,” however, is that which is commonly applied to all the courts convened under Art. 81.

The commander of the regiment or corps need not be of any particular rank: it is only necessary that he have under him four officers eligible for detail as members and judge advocate. The commander is not authorized to detail himself as one of the court.

Jurisdiction.—By Arts. 81 and 83 it is provided that “regimental” (as well as “garrison” courts) shall not have power to try capital cases or commissioned officers. Their jurisdiction is thus limited to offences not punishable with death, committed by non-commissioned officers (where not specially excepted from such jurisdiction by Army Regulations), or privates of the particular command. An inferior court, therefore, cannot legally assume jurisdiction of any of the offences (however slight the instances may be) which are specified in Arts. 21 to 23, 39, 41 to 46, and 56, because the same are therein made punishable “by death or such other punishment as a court-martial may direct.” Further, an inferior court cannot take cognizance of offences made *exclusively* punishable by a *general* court, as, for example, the crimes specified in Art. 58.

Thus inferior courts are *legally authorized* to take cognizance of all military offences of soldiers, *however grave*, provided the same are not made punishable *capitally*, or *exclusively* by a general court. But while thus

empowered to pass upon many cases of serious offences, their authority to *punish* is so inadequate to the proper disposition of such cases, in the event of conviction, that they should not be called upon to try them if it can be avoided, but the same should be reserved for the action of general courts. [See G. O. 40 of 1898.]

Inferior, unlike general courts-martial, are not affected, as to their jurisdiction or procedure, by the limitations of the 103d Article. But for an inferior court to take cognizance of an offence committed more than two years before its date would be unprecedented.

Power of punishment.—Art. 83 declares that inferior courts “*shall not have power . . . to inflict a fine exceeding one month’s pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*”

“*Fine*,” here, measured as it is by the month’s pay of the soldier, has practically the same meaning as *forfeiture*. A fine, in the sense in which the word is employed in the civil procedure, is rarely if ever adjudged by a regimental or garrison court; the pecuniary mulct imposed under this provision of the Article being almost invariably a *forfeiture* of a month’s pay, or of a certain number of dollars of pay of a lesser amount.

The court is authorized to adjudge *both* punishments specified—*i.e.*, both forfeiture and imprisonment (either with or without hard labor)—in the same sentence, provided neither exceeds the legal limit. An exceeding by the court of the scope of the power cannot be made good by any action of the reviewing commander. But in such a case the commander may give effect to the legal measure of the punishment imposed, by approving the same as to this amount and disapproving it as to the excess. [Circ. 12, H. Q. A., 1892.]

The "imprisonment" commonly imposed under this Article is imprisonment in the guard-house. "Hard labor," as a distinct penalty, is now rarely adjudged by inferior courts, being mostly reserved for cases of persons sentenced by general courts to confinement in a military prison.

Art. 83, in specifying that inferior courts shall inflict only a certain quantity of three designated punishments, does not exclude such courts from imposing other punishments customary and suitable for enlisted men. Thus *reduction to the ranks* may be and often is adjudged by these courts to non-commissioned officers, either as the sole penalty or in addition to one or more of the penalties named in the Article. But dishonorable discharge (see Art. 4) can be imposed only by a general court.

Procedure.—The procedure of a regimental or garrison court is in most respects substantially identical with that of a general court-martial. The majority of the Articles of War which relate to the conduct of a military trial refer in terms to "courts-martial" without distinction and are thus applicable to the inferior equally as to the superior courts. Such, for example, are—Art. 74, authorizing the appointment of a judge advocate; Art. 84, prescribing the oath to be taken by the members; Art. 86, providing for the punishment of contempts; Art. 88, recognizing the right of challenge; Art. 91, relating to the use in evidence of depositions; Art. 93, authorizing the granting by the court of continuances; Art. 94, fixing the hours of session; Art. 95, directing as to the order of voting by the members. As to matters not regulated by statute, the rules of the procedure and practice of *general* courts, as fixed by the common law of the service, are ordinarily applicable to, and to be followed by, inferior courts. Thus it is the

duty of the senior member of the court to preside, preserve order, etc.; the action or judgment of the court is determined by the vote of the majority; the function and authority of the judge advocate are as set forth in the Chapter treating of that official; the rights of the accused are similar to those heretofore indicated as customarily accorded him. So, the record of a regimental or garrison court is made up and authenticated in substantially the same manner and form as that of a general court, and, when completed, is transmitted to the convening authority.

Action on the Proceedings.—The proceedings and sentences of regimental courts are to be reviewed and acted upon by the commanders indicated in Art. 81, by which these courts are authorized. The principles set forth in the last Chapter as governing the subject of the authority, discretion and duty of the Reviewing Officer, will apply in general to the action of these commanders. The *form* of the action, as indorsed upon the record, is substantially the same as that adopted in a case tried by a general court, only that it is commonly expressed in briefer terms.

Art. 112 gives to the commander by whom a regimental or garrison court has been convened a power of pardon and mitigation analogous to that given in cases of punishments adjudged by *general* courts.

2. The Garrison Court-Martial—*Its authority and nature.*—The court known as the “garrison” court is authorized by Art. 82, which enacts that—
“Every officer commanding a garrison, fort or other place where the troops consist of different corps, shall . . . be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offences not capital.”

This provision differs from Art. 81, in that, while that

Article authorizes courts for commands consisting of a single element—*i.e.*, comprising only officers and men of one and the same organization,—Art. 82 provides for the assembling of courts in commands of a *composite* character. The one Article is thus the complement of the other.

The general term "other place" used in Art. 82 is a designation of the most comprehensive character, including any camp, post, barracks, bivouac, rendezvous, hospital, arsenal, transport, or other situation or locality whatever at which there may be stationed, or may temporarily remain, a command of the nature contemplated by the Article. The description, "where the troops consist of different corps," applies to the words "garrison" and "fort," as well as to the term "other place." As to the term "different corps," the construction given to it by General Scott in 1843 has ever since been followed. This is that, to fix upon the command the character of one consisting of "different corps," and to authorize its commander to convene a garrison court, it is sufficient that there should be on duty with the command, as a part of it, a *single* representative only—officer or enlisted man—of some arm or component of the military establishment other than that one of which the command, with this exception, is made up. Thus, if the body of the command consist of a regiment or detachment of infantry, it will be sufficient for the purpose indicated if there be stationed or serving with it an officer or enlisted man of a cavalry or artillery regiment, or of any branch of the staff of the army, as, for example, a medical officer or hospital steward, officer or non-commissioned officer of the quartermaster or subsistence department, chaplain, etc.

Jurisdiction, etc.—What has been said of the Jurisdiction, Power of punishment, Procedure and Action on

the proceedings, of Regimental courts, applies alike to Garrison courts. In time of peace the latter, as being in general better adapted to the commands assembled at military posts, are much more frequently resorted to than the former.

3. **The Field Officer's Court***—*Its authority and nature.*—This court was inaugurated by an enactment of 1862, now incorporated in the 80th, 83d and 110th Articles of War. It differs from the other and old-established inferior courts in—(1) that it is authorized only for time of war; (2) that it takes the place, in war, of the regimental or garrison court, whenever it can practicably be convened; (3) that its sentences are not ordinarily executed by the simple order of the convening officer but may require, to give them effect, the approval of a higher commander.

Constitution.—The Articles are silent as to the superior by whom the Field Officer may be detailed as a court. In practice, field officer's courts, where resorted to, have commonly been detailed by commanders of regiments. Where it has been impracticable to convene them on account of the want of an eligible officer or otherwise, the ordinary regimental or garrison court, or a general court, has been convened instead.

Composition.—The officer detailed for the court must be not only a field officer but a *regimental* officer, and an officer of the regiment to which the parties tried belong. A staff officer is not eligible for the detail.

Jurisdiction.—As has been remarked, the jurisdiction of the Field Officer is restricted to time of war. As to the persons within his jurisdiction, these, as indicated by the Article, are the enlisted men of the regiment in and for which he is detailed as a court. The regiment is the exclusive field of his jurisdiction and its limit. As to

* This court has been abolished by the recent Act of June 18, 1898, which repeals the 80th and 110th Articles of War. (See G. O. 80 of 1898.)

offences, his jurisdiction is similar to that of the other inferior courts.

Power of punishment.—By Art. 83, the Field Officer is invested as a court with precisely the same authority to sentence as is the regimental or the garrison court.

Procedure.—There is no requirement of law that the Field Officer shall be *sworn* as a court. Nor is a judge advocate required or in practice detailed for this species of court. The Field Officer himself performs the whole duty of the court—conducts the investigation and keeps the record. In view of the summary character of its proceedings, the record of the Field Officer's court will properly be brief and simple. Unlike the records of other inferior, or of general courts, it does not ordinarily set forth the testimony, when any is taken, nor does it contain any reference to the affording to the accused of an opportunity for challenge, the Field Officer not being liable to such objection. In other respects the record will properly follow the essential features of the records of other courts, setting forth such particulars as are requisite to exhibit the authority and the action of the Officer. It will thus properly recite the order of detail, the names, etc., of the offenders tried, their offences as charged and their pleas, the findings of the court and the punishments adjudged upon conviction; the whole being authenticated by the Officer's signature.

Action upon the proceedings.—Art. 110 prescribes that the sentence of a field officer's court must, in order to be executed, be approved "*by the brigade commander,*" or, if there be none, "*by the commanding officer of the post or camp.*" Where, therefore, a regiment is a part neither of a brigade nor a post or camp command, it will be quite useless for the regimental commander to detail a field officer as a court, since no punishment ad-

judged by him can take effect: some other court will therefore properly be resorted to.

4. **The Summary Court.**—This Court was established by the Act of Oct. 1, 1890, recently materially amended by the Act of June 18, 1898. The amended law provides that the court may be ordered by “the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion or company, or other detachment in the Army”; * that it shall consist of one officer, and have jurisdiction of offences of enlisted men formerly cognizable by garrison, regimental, or field officer’s court; and may inflict punishment not exceeding “confinement at hard labor for one month and forfeiture of one month’s pay,” with reduction to the ranks in cases of non-commissioned officers. Further provisions as to the procedure, etc., of this court will be found in the Act of 1898 as set forth in the Appendix, page 380. This Act makes the Summary Court legal in time of war as well as peace, and abolishes the Field Officer’s Court.

The Act of 1898 provides that no sentence adjudged by said summary court shall be executed until it shall have been approved by the “officer appointing the court or by the officer commanding for the time being.” It provides further that “the commanding officers authorized to approve the sentences of summary courts shall have power to remit or mitigate the same.”

The form of the *record* of a summary court is indicated in the A. R., par. 932. The proceedings are further regulated by par. 935.

This court, as an agency for expeditiously disposing of cases of slight offences, has been found a very effectual instrument of discipline in the army. It should not,

* See Circ. 49 of 1898.

however, be resorted to in trivial cases, where—as remarked by the Secretary of War, in G. O. 73 of 1892—it is within the power of commanders to visit the delinquencies by “admonitions or the withholding of privileges and indulgences.” See par. 930, A. R.; also Circ. 5 of 1898, which authorizes the “requiring of extra tours of fatigue, unless the soldier concerned demands a trial.”

The subject of Military Boards—of which the most important are the Retiring Board, provided for in Chapter Two of Title XIV of the Revised Statutes, and invested with some of the powers of a court; and the Board of Survey, authorized and defined in Title LXXI of the Army Regulations—will be found considered in Chapter XXII of the main work of which this is an abridgment.

CHAPTER XIX.

THE COURT OF INQUIRY.

The law relating to the Court of Inquiry.—The law on this subject is contained in the seven Articles of War from the 115th to the 121st inclusive. These Articles prescribe when and by whom courts of inquiry may be ordered; what shall be their composition; what shall be their powers and duties; how the members and witnesses shall be sworn; how their proceedings shall be recorded and authenticated; and when such proceedings shall be admissible in evidence before courts-martial.

Its nature and value.—The court of inquiry, so called, is really not a court at all. No criminal issue is formed before it, it arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial, nor is its conclusion (when it expresses one) a judgment. It does not administer justice, and is not sworn to do so but simply to “examine and inquire.” It is thus not a Court but rather a Board—a board of investigation with the incidental authority (when expressly conferred upon it) of pronouncing an opinion upon the facts. But, as it is a sworn body, and as the witnesses before it are sworn and examined and cross-examined as before courts-martial, it is a Board of a higher sort in the nature of a court, and has thus come to be termed a court in the law military. But, though only *quasi* judicial, it is an

instrumentality of no little scope and importance; its investigations are frequently much more extended and its conclusions more comprehensive than would be those of a court-martial in a similar case; and, in individual instances, its results may be scarcely less final than if it had the power to convict and sentence. Further, as contributions to history or to the annals of the Army, the researches and reports of courts of inquiry have been especially significant and valuable.

Its constitution.—Art. 115 confers the power to order a court of inquiry on the President absolutely, and on commanding officers when such court is demanded by the “officer or soldier whose conduct is to be inquired of.” “Any commanding officer” may then convene the court, the power being thus made incident to distinctive command as such. Thus the commander of a district, post, regiment, or independent company or detachment, may, if duly applied to for the purpose, order this court with the same legality as may the commander of a department or army, though the exercise of such authority on the part of an inferior commander, or in a case of a soldier, is of rare occurrence in our service. On the other hand, it is always optional with the commander to refuse the application, if he thinks that to grant it will not subserve the public interests.

Its composition.—Art. 116 provides that “A court of inquiry shall consist of one or more officers, not exceeding three.” In practice such court is generally composed with three members: a detail of less than three is unfrequent. In a recent instance it was specially enacted by Congress that a certain important court of inquiry should “consist of not less than five officers,” and it was in fact constituted with seven members.

As to the *rank* of members of courts of inquiry, the law is silent and therefore without restriction. Art. 79,

in providing that "no officer shall, when it can be avoided, be *tried* by officers inferior to him in rank," applies of course only to courts-martial.

Its function.—The function of the court of inquiry in our service appears from Arts. 115 and 119. In the former its general purpose is indicated to be—"*to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier.*" By the latter, it is required to "*give an opinion on the merits of the case,*" when "*specially ordered to do so.*"

The investigation.—The scope of the investigation, or "examination," commonly pursued by a court of inquiry, will appear from the objects or uses for which such a court is ordered or applied for. These are, mainly, either—1. To collect and report the actual facts of a *transaction*, with a view to fully inform the President, or commander, as to the same; 2. To collect the evidence in a case of an *offence* with a view to the determining of the question whether or not a court-martial shall be ordered for the trial of the supposed offender; 3. To *vindicate* the character or conduct of an officer (or soldier) whose reputation or action has been seriously aspersed or injuriously criticised in some official report or authoritative publication (or even newspaper article),* or who has been severely rebuked or censured by a military superior, or who deems himself to have been otherwise aggrieved in his military capacity. In such a case, however, though the primary object of the inquiry be vindication, the result may be quite the reverse.

The investigation of a court of inquiry, not being restricted by the military statute of limitations (Art. 103), which applies only to proceedings before "a general court-martial," may be extended without regard to the date of the occurrences inquired into. A peculiar advantage, indeed, of these courts over courts-martial is

* See case in G. O. 181 of 1898.

that they are thus empowered to investigate a series of acts or course of conduct—such as the administration of an office, the execution of a special trust, the management of an expedition or a campaign, the keeping of a continued account of receipts and disbursements, etc., embracing, in their relations, a considerable number of years, or any indefinite period. While in practice these courts will rarely be called upon to go into transactions remote in time, it is yet the fact that some of the most conspicuous instances in which courts of inquiry have been resorted to in this country have been cases in which a trial by court-martial was barred by the lapse of the statutory period, and a court of inquiry remained the only means by which the facts could be satisfactorily investigated.

The court of inquiry, though assimilated in its practice to the court-martial, is not bound by the same strict rules either of evidence or procedure.

The opinion.—This should be founded upon and confined to the facts or merits of the particular case. Thus, if the court is directed to express its opinion as to whether a court-martial should properly be convened for the trial of a person or persons charged with, or suspected of, an offence committed, it will confine the opinion to the charges, if any, referred to it for examination, or—if there be no specific charges—to the subject-matter of the evidence elicited upon the investigation. But an opinion may properly be something more than a mere conclusion; so, though the court may not volunteer its views on extraneous matters, it may and generally should state in full the reasons and considerations upon which its opinion is based.

In practice, where the members dissent, the conclusion of the majority is commonly reported as the opinion. But, legally, the majority rule does not apply

here with the same strictness as before courts-martial ; and dissenting opinions may be, and in some cases have been, reported, where, after full consideration, the members have failed to agree.

Province and duties of the recorder.—Although it is provided in Art. 116 that “*A court of inquiry shall consist of*” certain officers “*and a recorder,*” the special use and purpose of this officer is added as follows, viz.: “*to reduce the proceedings and evidence to writing.*” So, in Art. 117, while it is provided that the members of the court shall be sworn to “*examine and inquire,*” the recorder is required to be separately sworn to “*accurately and impartially record the proceedings of the court and the evidence.*” It is thus quite clear that the recorder—like the judge advocate of a court-martial—is not intended to be a member of the court, nor has he been treated as such in practice.

As indicated by these Articles, as also by Arts. 118 and 120, the powers and duties of the recorder are to qualify the members by administering to them the prescribed form of oath ; to summon, swear, and examine the witnesses, (cross-examining also, if desirable, those introduced by the other party, if there be one) ; to prepare the record, and to authenticate, with the president, the completed proceedings. The investigation not being a *trial*, the recorder will not properly assume the *role* of prosecutor. Further, unlike a judge advocate, he is not invested with a capacity or duty of *adviser* to the court, though, if called upon, he will properly assist it in examining the law applicable to the case.

The procedure.—The party accused, or “*whose conduct is inquired of,*” is entitled to be *present* (with *counsel*, if desired), and to examine and cross-examine the witnesses similarly as before a court-martial ; and, under the existing law, he may himself take the stand

as a witness. He may also present an argument or statement at the close. The inquiry, however, not being a trial, his presence thereat is not essential. The *accuser*, where there is one, has also generally been allowed to be present, and with his counsel; and a similar privilege is properly extended to an officer whose conduct will be materially *involved* in the inquiry.

Although the Article of War on the subject of *challenges* (the 88th) permits of objections only to members of courts-martial, the usage of the service, as already remarked, extends a like privilege to accused persons before courts of inquiry.

As to the *form of oath* prescribed in Art. 117 for the members and recorder, this does not impose an obligation of secrecy corresponding to that prescribed for the members, etc., of courts-martial. It would, however, be highly unmilitary and indecorous for a member or the recorder to communicate, either to the accused or other person, the opinion or recommendation of the court, without the authority of the convening official or before the same is published in orders.

Courts of inquiry are commonly *open*, and there is no legal restriction upon their *hours of session*. The *presiding officer* acts as the organ of the court, and keeps order as in the case of a court-martial. But a court of inquiry, having no original judicial authority, and not being embraced within the description of Art. 86, which applies in terms only to courts-martial and cannot, as a penal statute, be enlarged by implication, is not empowered to punish, as for a *contempt*, persons guilty of disrespect, disorder, or violence in its presence. It can only, therefore, cause them to be removed, leaving the matter of their punishment to the proper authorities, military or civil.

At the close of the hearing (after argument had, if

any), a court of inquiry clears, deliberates, and completes its record (to which it will properly add a *summary* of the material evidence), and, where ordered to do so, appends its formal opinion upon the merits of the case, or the matter or question as to which its views are required. The proceedings are then authenticated as prescribed in Art. 120, and transmitted to the commanding officer or the President.

Action.—The action to be taken is entirely in the discretion of the reviewing authority. If an opinion has been given, he may approve or disapprove it, and wholly or partially, as he may deem just or expedient. If, for instance, it is to the effect that sufficient grounds exist for ordering a court-martial in the case, he may elect to order one, or may decide that no further proceedings are required. So, where any other measure is recommended, he may adopt the view of the court, or may resort to action quite different, or may take none whatever. If not satisfied with the investigation, or with the report or opinion, he may reassemble the court, in the same manner as a court-martial, and return the proceedings with directions either to have the investigation pursued further and completed, or the report of the facts made more detailed and comprehensive, or the opinion expressed in terms more definite and unequivocal or more responsive to the original instructions, or to correct or supply some other error or defect. The inquiry not being a trial, but an investigation merely, the court may properly be required, upon revision, to rehear witnesses or to take entirely new testimony; or, if found necessary, it may do so of its own motion without orders.

The report or opinion, with the action taken thereon, is commonly published in General Orders. Where not deemed politic to promulgate more, the result only may be briefly announced—as, for example, that it is deter-

mined that "*no further proceedings are called for*" in the case.

The proceedings as evidence.—It is provided by Art. 121 that "*The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer; provided, that the circumstances are such that oral testimony cannot be obtained.*" By the term "proceedings" is evidently had in view chiefly the testimony—i.e., testimony on the merits; and the occasion contemplated doubtless was that of a trial by court-martial of a case which had previously been investigated by a court of inquiry. In such a case it could not prejudice the interests of justice, but the reverse, to admit in evidence the sworn testimony of witnesses who had recently testified before the court of inquiry, but whose personal attendance at the court-martial could not by reasonable diligence be secured. As to the excepted "*cases not capital, nor extending to the dismissal of an officer,*" it is to be said that the cases here intended are (1) cases of offences *capitally punishable*, and (2) cases of offences for which the penalty of dismissal is made *mandatoru* upon conviction.

CHAPTER XX.

ARTICLES OF WAR SEPARATELY CONSIDERED.

A CONSIDERABLE proportion of the Articles of our Code have already been considered in connection with the subjects discussed in previous Chapters. Of those remaining the most important, including those relating to the graver military offences, will now be considered.

I. THE FIFTH, SIXTH AND FOURTEENTH ARTICLES.

[False Muster, etc.]

ART. 5. *Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster and punished accordingly.*

ART. 6. *Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster-rolls, shall be dismissed from the service and shall thereby be disabled to hold any office or employment in the service of the United States.*

ART. 14. *Any officer who knowingly makes a false muster of man or horse, or who signs, or directs or allows the signing of any muster-roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses before a court-martial, be dismissed from the service and shall thereby be disabled to hold any office or employment in the service of the United States.*

The offences made punishable.—These Articles, which make punishable certain acts when committed by commissioned officers, are—apparently by accident—misplaced in the present code. Article 14, which is the most important, including as it does the provision of Article 5 and more, should itself be numbered 5, the other two being numbered 6 and 7 respectively. The offences specified in these Articles are—the knowingly making a false muster of a soldier or other person or of a public animal; the signing, or directing or allowing the signing, of a muster-roll, knowing the same to contain a false muster; and the incidental offence of taking money or other bribe or “gratification,” as a consideration for the mustering of a regiment or company, or for the signing of a muster-roll.

Muster.—This term may be defined as the assembling, inspecting, entering upon the formal rolls and officially reporting as a component part of the command, of persons or public animals. The musters in our service are commonly *for pay*, and precede the regular payments of the commands.

False muster.—This offence consists in the including, knowingly, by an officer at a formal muster, or upon an official muster-roll, as a component of his command, or of a body under his charge, of a person as a soldier or public employee who is not such, or of a soldier or person as present who is absent, discharged, or deceased, or of a person designated by a false name, or of a person as effective who is in fact disabled and ineffective, or of a private soldier as a non-commissioned officer, or of a public animal which does not exist or is not present, etc. The offence is a very old one in military law, being made punishable in the Articles of War of the Tudor kings and those of Gustavus Adolphus. The British law on the subject was aimed at those who, at a

time when the armies were raised and equipped "on the private contract of individuals," might attempt by fraud or misrepresentation to evade the furnishing of their full contingents to the royal army, or who might connive with those thus evading. In our late war this offence was sometimes committed by mustering, as part of the quota of a company or regiment, civilians employed to personate actual soldiers, with a view to enabling the officer concerned to receive a certain commission and rank to which he would not be entitled if his command remained below a certain number.

The knowledge required.—The guilty knowledge, expressed in the above Articles by the words "knowingly" and "knowing," and which is the *gist* of the offences specified, may be proved by direct evidence, but more generally will be established inferentially from circumstances indicating that the accused must in all reasonable probability have made the muster, or signed, etc., the roll, with knowledge that it was in fact, wholly or in some material part or parts, untrue or deceptive. An officer will in general properly be charged with the knowledge of what it is his office to know, or what he is bound to know in the performance of the particular duty developed upon him.

Witnesses required.—The offence of false muster is required by Art. 14 to be proved "by two witnesses." This measure of proof is similar to that enjoined by the common-law rule in the case of *perjury* (or the making of a false statement under oath in a judicial proceeding as to a matter material to the issue), and for a similar reason. Were there but one witness as to the allegation of guilty knowledge, it might with fairness be claimed that his testimony was counterbalanced by the official act or statement of the officer in the muster or roll; as in *perjury* it might be claimed that the testi-

mony of one witness was counterbalanced by the sworn statement of the party when on the stand. At least one other witness is therefore properly required to turn the scale against the accused.

The punishment.—The penalty of disability or disqualification for office or employment under the United States, prescribed in Articles 6 and 14, dates from the early period already referred to, when it was considered necessary to compel, at the peril of the severest penalties—in some instances even of death—the mustering, or exhibiting upon rolls, of genuine troops, and the furnishing of the actual compléments required. Subsequently, when, as observed by Samuel, the British army came to consist “no longer of private supplies but of national levies,” the previous severity was relaxed and the penalty of disqualification discontinued. It may be regretted that a similar change has not been made in our own Articles.

It is to be remarked that the disability to hold office, etc., here prescribed, attaches as a *legal consequence* to the conviction and punishment of dismissal, and need not be specifically adjudged in the sentence.

II. THE TWENTIETH AND TWENTY-FIRST ARTICLES.

[Disrespect, Disobedience, etc.]

ART. 20. *Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.*

ART. 21. *Any officer or soldier who, on any pretence whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.*

Twentieth Article—*Nature of the offence.*—The offence here specified is disrespect “toward”—*i.e.*, to, or in reference to—a “commanding” officer. Disrespectful behavior toward a superior who is not a commanding officer is an offence not under this but under the 62d Article.

The disrespect may be by acts or words. It is not essential that it be *intentional*: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may equally with a deliberate act constitute an offence under the Article. An intentional disrespect is of course much more aggravated than one which is unintentional: a disrespect is also aggravated where it is *publicly* committed.

Defence.—It is no defence to a charge under this Article that the alleged words or acts were directed at the commander, not in his official or military, but only in his private or civil capacity: the law of military discipline cannot safely recognize such distinctions. It is also no defence to a charge for using disrespectful language that the same only stated *facts*, or that what was said was no more than *deserved* by the superior. If an officer or soldier has been aggrieved by his commander, he should, instead of inveighing against him, properly seek redress under the 29th or 30th Article of War, or otherwise through the regular military channels.

Twenty-first Article—*The offences made punishable.*—This Article makes punishable, “by death or such other punishment as a court-martial may direct”—1. The commission of a *battery*, or of an *assault*, upon a superior officer, by striking him, drawing or lifting up a weapon menacingly against him, or offering him any other form of physical violence; 2. The disobedience of the lawful order of a superior officer.

The striking, or doing, etc., of violence.—This is an

offence of the gravest character. The person of a superior officer should be sacred to an inferior; and it is only in the extremest case, as when he is acting in self-defence against illegal violence, or is engaged in quelling a disorder under Art. 24, that a soldier or other inferior can be warranted in using any measure of force against a superior. To constitute the offence, the striking or doing of violence must be intentional; a merely accidental blow or contact will not be sufficient. So, the violence, where not executed, must be physically attempted or menaced. A mere threatening in *words*, without any purpose of proceeding further, would not be an offering of violence in the sense of the Article.

The officer assailed need only be a "superior officer"; it is not necessary that he be a commanding officer. And to warrant a conviction, it should appear that the accused was *aware* that the person assailed by him was his superior officer. If the latter was an officer of the same company, regiment or garrison, or if he wore a uniform indicating his rank, the accused may in general be presumed to have known or believed that he was such superior. If the officer was not thus readily recognizable, as where he wore no distinctive uniform, or where the offence was committed in the night-time, it will depend upon all the circumstances, as they appear in the testimony, whether the accused shall be deemed to have had the knowledge or belief requisite.

To bring the offence within this Article, the superior officer must also have been, at the time of the violence, "*in the execution of his office*"; that is to say, in the performance either of his special function, or of any duty or act legal and appropriate for an officer of his rank or office to perform.

Disobedience of orders.—Obedience to orders is the vital principle of the military life—the fundamental

rule of discipline in peace as well as in war. This rule the officer finds recited in the commission which he accepts, and the soldier, in his oath of enlistment, swears to observe it. The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full. The inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms. Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing till after compliance his complaint and application for redress.

To constitute the offence contemplated by the Article, the disobedience, whether exhibited in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done, must be wilful and intentional. A mere *neglect* to comply with an order, through heedlessness, remissness, or forgetfulness, is an offence chargeable, not in general under this Article, but under the 62d. On the other hand, the order, whether it be oral or written, must be a specific mandate. A failure to comply with mere instructions, or with a general regulation of the Army or of the particular command, will not amount to the distinctive offence under consideration.

The order must, as it is expressed in the Article, be a "*lawful command*." That is to say, it must be one issued by a superior competent to give it, and one which commands an act authorized or sanctioned by the laws or usages of the service. Its legality may depend in a measure upon the time or emergency. Thus an order which would not be lawful in time of peace may be en-

tirely lawful in time of war. But, in general, an order of an official superior, not palpably illegal on its face, is to be presumed to be authorized and legal, and an inferior, in assuming to disobey it, will do so on his own responsibility and at his own risk and peril. That the order is exceptional and unreasonable will not excuse the disobeying of it, unless it be also clearly repugnant to law or usage.

III. THE TWENTY-SECOND, TWENTY-THIRD AND TWENTY-FOURTH ARTICLES. [Mutiny, Affray, etc.]

ART. 22. *Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.*

ART. 23. *Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.*

ART. 24. *All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer; or draws a weapon upon him, shall be punished as a court-martial may direct.*

Twenty-second Article—*The specific offences made punishable.*—The offences specified in this Article are the beginning, exciting, causing, or joining in, a mutiny or a sedition. In other words, it makes punishable an officer or soldier who originates or is instrumental in originating a mutiny (or sedition), or who participates in one when initiated. The beginning of a mutiny may be the act of a single and separate person. The joining in a mutiny is a joint act with others, and the common-law doctrine applicable to conspiracies, *viz.*, that each conspirator is amenable for the illegal acts of his associates in pursuance of the common design, is applicable here. To complete either of the offences contemplated by the Article, a mutiny must actually have occurred. A mere attempt to create a mutiny, which has proved abortive, is not chargeable under this Article but must be charged under Art. 62.

Mutiny defined.—Mutiny is an unlawful opposition or resistance to, or defiance of, superior military authority, with a deliberate purpose to subvert or prevail over the same. Consisting, as it does, in pronounced insubordination intensified by a special criminal *animus*, it has sometimes been described as the gravest, and is certainly one of the gravest, of the acts denounced in the military code. It is the particular purpose or intent characterizing this offence which distinguishes it from certain other offences, with which, to the embarrassment of the student, it has been not unfrequently confused. Thus disrespect toward a commanding officer, the offence which is the subject of Art. 20, as also the doing or offering of violence to a superior officer made punishable by Art. 21, have sometimes, when aggravated, been erroneously charged as mutiny. Still more frequently has the designation of mutiny been erroneously attached to disorders of the class known as “mutinous conduct,”

which, stopping short of overt acts of resistance, or not characterized by a deliberate intent to override superior authority, are no more than acts "to the prejudice of good order and military discipline," cognizable under Art. 62.

Proof of intent.—The intent may be openly declared in words, or it may be implied from the act or acts done—as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a rescue or attempt to rescue a prisoner, a stacking of arms and refusal to march or do duty, a taking up arms and assuming a menacing attitude, etc.; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of *combination*—that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose—is, though not conclusive, the most significant evidence of the existence of the intent in question.

Intent alone not sufficient.—While the intent indicated is essential to the offence, the offence is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice.

A violent act not necessary.—The opposition or resistance need not be active or violent. It thus may consist simply in a persistent refusal or omission (with the *intent* above specified) to obey orders or do duty.

The resistance, etc., must be to lawful authority.—If the superior when resisted is attempting to execute an illegal order, or to enforce his authority by illegal means, it will not be mutiny to resist him. But the unlawful-

ness of his act must be manifest and unquestionable to justify the inferior in resistance, and what has been said under Art. 21, as to the responsibility assumed in disobeying a command on the ground that it is not lawful, is even with greater force applicable here.

A combination not essential, though usual.—To constitute mutiny it is not necessary that there should be a concert of several persons: a single individual may entertain the intent and commit the act of mutiny. Thus it has already been remarked that the offence of “beginning a mutiny” may be committed by one person acting separately and alone. A combination, however, or “joining,” is usual and indeed almost invariable; the causes which actuate mutiny being commonly matters of joint grievance or complaint with a greater or less number of persons. The concert, where it exists, need not necessarily be *preconcert*; but, as mutinies naturally grow out of previous consultations and conspirings, it will generally be such.

Sedition.—This is defined as opposition or resistance by military persons to the *civil* authorities, demonstrated by riot or other breach of the peace. Instances of trials for this offence have been of rare occurrence.

The sentence—Punishment of mutiny.—For mutiny the punishment will ordinarily be more severe in time of war than in peace: in the late war the *death* sentence was repeatedly adjudged upon conviction. The punishment being left discretionary, the court will naturally and properly adjudge a severer penalty to ringleaders, especially of superior rank, than to those who are merely their followers or instruments, and, where two or more grades are associated in the crime, will in general properly punish superiors more heavily than inferiors. There can be no *defence* to mutiny, but if the fact can be made clearly to appear that the mutiny was provoked or ag-

gravated by a tyrannical or oppressive policy, by some undue violence or severity, by an unwarranted deprivation of a right or neglect to redress a wrong, or by drunkenness or other misconduct on the part of the commander, or a failure by him to maintain discipline in the command,—such fact will properly be taken into consideration as going to extenuate the offence and reduce the measure of punishment.

Twenty-third Article.—This Article makes capitally punishable an officer or soldier who, being present at a mutiny (or sedition), does not use his utmost endeavor to suppress the same, or who, having knowledge of an intended mutiny (or sedition), does not without delay give information thereof to his commanding officer.

Suppression of mutiny.—The Article arms an officer or soldier present at an actual mutiny with extraordinary summary powers, and requires him to execute them. The term “utmost endeavor” is to be construed as having a relative bearing, the word “utmost” thus meaning the utmost that may reasonably be called for by the circumstances of the situation, and in view of the rank, command, and facilities for action of the individual. While, in extreme cases, an officer is warranted in employing the most rigorous means—in using a deadly weapon and taking life—for the suppression of a mutiny, he will not ordinarily thus be warranted in a case of mutiny unaccompanied by violence or where less forcible methods will be effectual. The measures adopted, and especially the amount of force employed, should properly depend upon the circumstances of the case, and particularly upon the existing status, whether of war or peace.

It is to be remarked that, in connection with the suppression of a mutiny, it will be no more than just for

the *commander* to remove as far as may be practicable the causes which led to the outbreak. Thus, where it has been occasioned either by defective discipline, oppressive treatment, the deprivation of a right, or the existence of any other real grievance, the commander, after first effectually suppressing the mutiny according to the injunction of the Article, may and properly should proceed to put an end to the abuse or to redress the wrong, either by his own orders or by making the necessary official representations to superior authority.

Giving information of mutiny.—While the suppression of a mutiny in the army will in most cases be incumbent more especially upon commissioned officers, the duty of giving information of the same will oftener devolve, in the first instance, upon non-commissioned officers, who, by reason of being nearer to the soldiery, will be better apprised of their purposes. In view of the imperative injunction to act “without delay,” an officer or soldier cannot be permitted to exercise his own judgment as to whether he will or not impart the intelligence contemplated.

Twenty-fourth Article—*Nature of the provision.*—This Article empowers both commissioned and non-commissioned officers to suppress all quarrels, frays and disorders in the army, and as a means to that end to place commissioned officers in arrest and non-commissioned officers and soldiers in confinement. It also makes punishable, at the discretion of a court-martial, any military person refusing to obey, or drawing a weapon upon, a commissioned or non-commissioned officer when exercising the authority conferred.

A “fray,” or “affray” (derived from the French *effrayer*, to frighten), is a fighting or hostile contention of two or more parties in public, to the terror of the citizens. At common law, any individual is authorized

to part and restrain persons engaged in an affray, as being a forcible disturbance of the public peace. The present Article thus practically adopts the doctrine of the common law in regard to the suppression of affrays, extends it to cases of "quarrels" and "disorders," and applies it, under certain conditions, to the military state. Placed as the Article is in immediate connection with the provisions relating to mutiny and duelling, it may well be inferred that one of its main purposes was, by the summary proceeding which it authorizes, to put a stop to those contentions and irregularities, which, if not suppressed at the outset, might readily lead to these formidable crimes.

By whom the power may be exercised.—It is held that not only commissioned officers but sergeants and corporals are vested by this Article with the power to part, quell and arrest, without regard to the superiority in rank of the persons whom they may thus regulate and restrain. An inferior, however, would not properly assume to exercise the authority to arrest a superior in the presence of a senior officer, unless, indeed, the latter was either himself concerned in the offence or conspicuously recreant in his duty on the occasion, or was incapacitated by some disability to act. It is further deemed clear that the power is one not attached to *command*, but quite independent of it, since it may be exercised without regard to the regiment, company, etc., to which the persons offending may belong.

Mode of exercise of the power.—In the exercise of the power conferred the officer may employ such means as may be requisite, resorting even to the use of a deadly weapon if other means fail or are inadequate. The action of an officer in repressing a disturbance which, if not at once subdued, may result in a mutiny or riot, should not be too strictly criticised; at the same time

he is in no case authorized to use more force than may be reasonable under the circumstances, or to resort to blows or other violence where the object may be attained by summoning a guard and causing the arrest or confinement of at least the leaders of the outbreak. Where such arrest, etc., has been ordered by an inferior officer or a non-commissioned officer, it will be, further, his duty, according to the terms of the Article, to report forthwith his action to the commanding officer of the person or persons arrested.

IV. THE TWENTY-SIXTH, TWENTY-SEVENTH AND
TWENTY-EIGHTH ARTICLES. [Challenges
to duels, etc.]

ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.

ART. 27. Any officer or non-commissioned officer commanding a guard who knowingly and willingly suffers any person to go forth to fight a duel shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command immediately to arrest the offender and bring him to trial.

ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be

punished as a challenger ; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law and have done their duty as good soldiers who subject themselves to discipline.

Purpose of these Articles.—These Articles aim at preventing duelling in the Army, by rendering liable to immediate arrest, trial and severe punishment, all military persons without distinction, who send or accept challenges, act as seconds, knowingly carry challenges or acceptances, or otherwise promote duels, as well as commanders of guards who neglect to stop parties going out to fight duels, and even persons who upbraid others with refusing to accept challenges.

Duelling, etc., at criminal law.—By the common law, the taking of life in a duel is murder in the killer, whatever may have been the occasion or provocation of the fight and notwithstanding the absence of actual homicidal intent. So it is also murder in the seconds of both parties and others who are present abetting the act; all such persons being treated as principals equally with the one who fires the fatal shot. At common law also the mere challenging of a person to fight a duel, though none be fought, is held to be a high misdemeanor, as being an act tending to a serious breach of the peace. So carriers of challenges (knowingly such), and other promoters of duels as well as provokers of the same, are held indictable for misdemeanor at common law.

The several offences in question are also made punishable by the statute law of most of the States. Military offenders will thus in general be amenable both to military charges and to criminal indictment.

Offence of sending a challenge.—A duel is a concerted fight between two persons with deadly weapons, having

for its alleged object the satisfaction of wounded honor. Its elements thus are, that it must be premeditated and deliberate, as distinguished from a sudden encounter in warm blood; must contemplate the employment of weapons from the use of which homicide may be expected as a natural and probable consequence, and must be resorted to, ostensibly at least, with a view to obtaining amends for some affront which has or is conceived to have injuriously affected the character or offended the sensibility of the person concerned as a man of honor. A *challenge* is a written or verbal invitation to another—whether military person or civilian—to unite in such a combat.

No particular form of words is necessary to constitute a challenge. The *intent* of the language employed is the material point. If the purpose of the communication, as gathered from its terms or the circumstances of the controversy, clearly is to invite to a duel the person addressed, it is a challenge in law.

To *prove* a sending, an actual delivery or receipt of the challenge need not be established, the offence being complete without it. But the sending, where a receipt is not proved, must be shown to have been such as would presumably have resulted in a delivery. If the mail was resorted to, the prosecution should be prepared to prove that the communication was put into the post-office or other proper place of deposit for letters, correctly addressed, and the postage prepaid if necessary; for the law will then presume that it was duly forwarded to its destination. Proof of the sending of a written challenge is in general completed by the production of the writing itself, with evidence that it is in the handwriting of the accused, or was penned by another at his dictation or request. Where the writing cannot be produced—as where it is in the possession of the opposite

party or lost—proof of its substance will be sufficient. It is to be added, however, that, to establish this offence, it is not necessary to show an *actual* sending: it will be sufficient if the fact of sending is clearly inferable from the declarations or acts of the accused.

Offence of accepting a challenge.—This offence may be established by proof of an acceptance either oral or written, and either communicated personally or dispatched by a messenger or by some other reasonably certain agency—as the mail. Where the acceptance is by written missive, the actual delivery of the same need not be shown; the same proof, however, of handwriting, etc., is to be made as in the instance of a challenge.

No specific form of words is necessary to constitute a verbal or written acceptance, the only requisite being that the language import an intent to accede to the invitation conveyed by the challenge. It is to be added that an acceptance, like a challenge, may be proved inferentially from the acts of the party, as, for example, from the fact that, having been challenged, he engaged in a duel.

Offences of the second, carrier and promoter.—That which peculiarly characterizes the *second* is his acting in a representative capacity for his principal: if a party does not sustain this character, he may be a “promoter” but cannot properly be charged as a second. Moreover, to make him a second, such capacity must be, not voluntary and gratuitous merely, but assumed at the instance or request of the principal or with his acquiescence. This acting of the second must, to constitute the offence, be either *at a duel*, or with a view to the fighting of one.

By the designation “*carriers*,” the Article no doubt mainly contemplates persons *other than seconds* who con-

vey challenges from one party to another. To constitute the offence of the carrier, the carrying must be performed *knowingly*,—i.e. the accused must know that the message is a challenge to fight a duel,—and it must result in an actual *delivery* of the challenge.

A *promoter* of a duel is any person who, by stimulating the resentments of another, or by appeals to his pride, shame, sense of “honor” so called, or otherwise (and whether by direct and pointed means or by covert insinuation), purposely incites him to tender or to accept a challenge, or, in any way, other than by acting as a second, or the carrier of a challenge, designedly furthers or contributes to the fighting of the duel. Carriers of *acceptances* (knowing them to be such) are clearly promoters, and so chargeable.

Offence of upbraiding another for refusing a challenge.—Upbraiding is reproaching, censuring, inveighing against, or stigmatizing. The most familiar form of upbraiding, at the period of the adoption of the Article on this subject, was “posting” as a coward by means of a written or printed public notice—an offence still made punishable in the statutes especially of the older States. It is clear, however, that the upbraiding intended by the Article need not be in writing but may be *oral* as well. The offence committed is equally within the Article whether the upbraider is the original challenger himself or some other person.

V. THE TWENTY-NINTH AND THIRTIETH ARTICLES.

[Redress of wrongs in regiments, etc.]

ART. 29. *Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where*

such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

ART. 30. *Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.*

Purpose and scope of the Articles.—These Articles, which have not been materially modified since their introduction into our original code of 1775, were intended to provide redress for officers and soldiers of regiments deeming themselves wronged, the former by their commanding officer, and the latter by any commissioned officer. The wrongs contemplated in the case of *officers* are mainly denials of rights or just privileges, or other arbitrary proceedings in contravention of military usage. In the case of *soldiers*, the wrongs intended are mainly such as may be done them in the course of the internal administration of the company or regimental command—as in denying to them a right to pay or to an allowance, pecuniary or otherwise, to which they are entitled, or in entering stoppages against them to which they should not be subjected. The term “wrongs” would also extend to such grievances as the imposition of unreasonable arrest, the assigning of improper duties, or the withholding of customary privileges where the fault of the officer consists in a misapprehension of facts or lack of discretion rather than an intention to injure or oppress. In all

cases the "wrongs" must be such as are susceptible of being remedied without a resort to a trial by court-martial. *Offences* cannot, as such, properly be complained of under this Article.

Procedure.—1. In a case of an *officer*: The aggrieved officer having first specifically applied in writing for redress to the regimental commander, and been refused, or granted but partial, relief, complains by way of appeal, in writing, to the general commanding (commonly the department commander), setting forth the facts of the case, and stating the substance of the original application and its result. This complaint is properly transmitted through the regimental commander, who makes such indorsement thereon, or communication therewith, as he may deem desirable, and the general is thus possessed of both sides of the controversy. If the regimental commander declines or unreasonably delays to forward the appeal, the officer is authorized to transmit it directly. Either the complainant or the regimental commander may accompany his statement by affidavits or statements of other persons, or by documentary or other written evidence. The general will examine the statements, etc., and consider the arguments, and, if he concludes that a wrong has been done, will proceed to redress the same, so far as it may be authorized and practicable for him to do so, issuing for the purpose the proper order or orders; and will thereupon render to the War Department the report indicated in the Article. If not empowered himself to afford redress, he will properly, in his report, favorably commend the claim to the Secretary of War. On the other hand, if he considers that no wrong was done by the regimental commander, he will formally disallow the complaint, leaving the officer, if not satisfied, to appeal to higher authority.

2. In a case of a *soldier*: The soldier addresses his

complaint in writing, preferably through his company commander, to the regimental commander, setting forth the particulars of his grievance or grievances. Upon the receipt of the communication, the commander convenes the regimental court, stating in the order the purpose for which it is assembled, and transmits to it the papers, if any, upon which the claim is based. This court is not, properly speaking, a *court* at all. It does not try an accused upon a charge of a military offence, nor does it acquit, convict, or sentence. It merely investigates and expresses an opinion, and thus resembles a court of inquiry or board much more nearly than a court-martial. No arrest is made of the officer whose act is complained of. Both parties appear, or may appear, before the court, and—if deemed desirable—produce testimony, cross-examine witnesses, and make argument. In general, however, especially where the evidence consists mainly of official papers, the investigation will be brief and simple. At its close, the court clears, deliberates, and frames its conclusion to the effect that the complaint either is or is not substantiated, with a further designation—if it be held sustained—of the particular form of relief which, in the opinion of the court, should be extended. Not being empowered to *try*, as for an *offence*, it cannot adjudge that the officer pay a fine, or award any *penalty* whatever. The proceedings, when concluded, are reported to the regimental commander, who, if he approve the same, will issue the proper order for carrying into effect the determination of the court.

If an *appeal* be taken, the appellant applies through the regular channels to the department or other proper commander for a general court-martial, which is thereupon ordered, and before which the proceedings are similar to those before the regimental court, except that, if the officer be the appellant, he now takes the initiative,

is first heard, etc. The investigation is now pursued *de novo*, and upon independent testimony. The evidence introduced may be the same as or different from that introduced at the first hearing, but it is now offered as original and precisely as if it had not been before presented. By the consent of parties, indeed, the record of testimony received by the regimental court may be admitted before the general court; but the latter court considers the evidence and makes up its opinion entirely independently of the action of the regimental court and unaffected by it. The opinion is to the effect that the appeal is or is not sustained—*i.e.* that the conclusion of the regimental court is either affirmed or overruled—with such additional expression of views as to the merits of the case as may be deemed desirable. If the appeal be found “groundless and vexatious,” an appropriate punishment is adjudged. Such punishment would in general be—to be reprimanded or to make an apology; or, in a graver case, to be confined, or to forfeit pay, or both, for a limited period.

Defects of the above provisions.—These Articles are antiquated and inadequate. They apply, strictly, only to cases arising in regiments and are thus not readily available at a time when, as now, the regiments of the Army are not stationed as entire and separate commands but are broken up into companies serving at different posts. Further, the wrongs which these statutes are intended to redress are ill-defined, and, in Art. 30, the province of the courts and authority of the commanders are not clearly set forth. Because of their inadequacy, these provisions are now in fact rarely resorted to; applications made in the first instance to the Department commander or the Secretary of War, through the proper channels, being in practice preferred.

VI. THE THIRTY-SECOND AND FORTY-SEVENTH
ARTICLES.

[Absence without leave, and Desertion.]

ART. 32. *Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.*

ART. 47. *Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.*

Thirty-second Article—Nature and proof of the offence.—The absence made punishable by this Article may be one unauthorized *ab initio*, or one which consists in not duly returning at the expiration of a pass, leave, or furlough. The Article, it will be observed, refers only to *soldiers*. Absence without leave by an *officer* is not made punishable in the code as a specific offence, and is therefore in general to be charged under Art. 62.

That the absence was “without leave” should be proved affirmatively; it cannot in general properly be presumed from the mere fact of absence. The want of authority should be shown by some superior, as the commanding officer, a company officer, the first sergeant, etc., or by a staff officer cognizant officially of the fact. The statement of a witness that the accused was “reported” absent without leave would be hearsay and insufficient. Similarly would an entry on a morning report book or muster-roll, that a soldier was absent without authority at a certain time, be quite insufficient

as legal evidence of the fact, since it would amount to a *charge* only of the offence.

Defence.—It will be a good defence that the party, while absent on a pass or furlough, was prevented from returning at the proper time by sickness or other disability, but to establish this excuse medical testimony will generally be required. That the accused was involuntarily detained by the force of the elements, the action of the civil authority, the operations of the enemy, or by being taken prisoner by the latter, may also constitute a valid defence; but where he has once deliberately absented himself without authority, the fact that he was detained away longer than he had intended by some agency beyond his control, will be no sufficient answer to the charge.

Punishment.—The brief unauthorized absences of soldiers are, in time of peace, most commonly referred for trial to inferior courts by which they are usually visited with a small forfeiture of pay or other light sentence. The offence, however, may be aggravated and thus call for a serious punishment: as, for example, where the absence was protracted; or where the soldier, in absenting himself, has abandoned an important duty; or where the offence was committed in time of war, when, in the words of Attorney General Legaré, “the absence falls, in contemplation of law, little short of desertion.”

Consequences by operation of law.—Upon absence without leave, as upon desertion, there are entailed, by operation of law, certain consequences, declared in par. 133 of the Army Regulations, as follows: “An enlisted man who absents himself from his post or company without authority, will forfeit all pay and allowances accruing during such absence, and, upon conviction by court-martial, make good the time lost.”

Forty-seventh Article—Desertion defined.—

This Article makes punishable one of the most common and at the same time one of the gravest offences known to military law. A deserter is one who absents himself from his regiment, station, or duty, and from the service, without authority, and with the intention of not returning. The offence of desertion thus consists of the minor offence of absence without leave coupled with and characterized by a deliberate purpose not to rejoin the military service but to abandon the same altogether, or at least to terminate and dissolve the existing military status and obligation. It is thus the *animus non revertendi*, or intention not to return, which is the gist and essential quality of the offence.

The absence.—This may be unauthorized from the beginning, as is the case in the majority of instances; or it may consist in not returning at the expiration of a furlough or other defined leave of absence. Or the absence may be originally involuntary—i.e. caused by an agency beyond the control of the party—as where he has been taken prisoner by the enemy: in such case, if, on being released or escaping, he does not return but takes the opportunity to abandon the service; or if, upon his capture, he enlists, not under duress but of his own volition, in the enemy's army—he is a deserter.

The intent.—The nature of the intent in desertion is best understood in considering the acts and occurrences from which it may be presumed, its existence being in general wholly a matter of inference from the circumstances of the particular case. The mere fact of an unauthorized absence for a certain period is not proof of the requisite intent. A protracted unexplained absence affords indeed a strong presumption that the party absented himself with the *animus* of desertion, and the longer the absence (prior to the arrest), the stronger, in

general, the presumption. To infer such intent solely from unauthorized absence of but brief duration will commonly be unwarranted: an absence, however, for a few days or even a part of a day, may, under certain circumstances, fully justify such an inference; and, in time of *war*, an absence of slight duration may be as significant as a considerably longer one in time of peace. It is declared in the Army Regulations, par. 133, that "No man will be *reported* a deserter until after the expiration of ten days (should he remain that length of time away), unless the company commander has conclusive evidence of the absentee's intention not to return."

The circumstances (other than the not returning for a considerable period) which may go to indicate that the absence has been actuated by the *animus* in question are numerous and varied, consisting as they may do in acts or declarations of the accused, not only prior to the offence, but also pending his absence, and at the time of or after his apprehension. Among such circumstances the more familiar are—secretly making preparations as for a permanent absence by collecting or disposing of personal effects, etc.; procuring a civilian's dress or other disguise; declarations by the accused to comrades, etc., of a desire to quit the service or command; attempts to persuade others to decamp with him; taking a horse, arms, ammunition, clothing, rations, or such other property of the government (or of individuals) as may facilitate a rapid removal, defend against arrest, protect against the weather, provide sustenance, etc.; taking passage on a railway train, steamer, or other conveyance for a distant point; the commission, in leaving, of some other military offence necessary to effectuate the desertion, as a quitting of his post as a sentinel; the fact that he has committed a homicide, larceny, embez-

zlement, or other crime, for which he would have been liable to severe punishment; the fact that, in leaving, he has escaped from a confinement or close arrest; his writing, during his absence, to comrades, etc., declaring an intention not to return; his assuming, during absence, a false name, or resorting to other means to conceal his identity and avoid detection; his being apprehended at a long distance from his station; his being pursued and overtaken when in evident flight; his being found, on arrest, dressed wholly or partly in civilians' clothes, or otherwise disguised; his resisting arrest; his denying, upon arrest, his identity, making false or contradictory statements, or failing to explain satisfactorily his absence. But the mere fact that a soldier absent without authority has been *arrested as a deserter* is not presumptive evidence that he is absent with the intent characterizing desertion.

Proof of the offence.—In order to substantiate a charge of desertion under this Article, it is necessary to establish—1. The fact that the accused officer or soldier has, in the words of the Article, “received pay or been duly enlisted;” 2. The fact that he absented himself without authority; 3. The fact that he did so with the intention not to return. The *onus* of proving each of these facts rests upon the prosecution.

Proof of receipt of pay or enlistment.—It will rarely be necessary to present this part of the proof in a formal manner. The accused indeed will generally admit of record, or not contest, the point that he is duly in the military service within the contemplation of the Article. In rare cases—as where a soldier claims that his enlistment was illegal and void—it may become essential to introduce (in the original or by copy) the enlistment contract or an official roll containing a receipt of pay signed by the accused, or, in the absence

of such written testimony, some competent parol evidence of an actual enlistment or of an acceptance of pay for military service. Commonly it will be sufficient to identify the accused as one who, for any considerable period, has served and acted as a soldier (or an officer) of the regiment, corps, etc., indicated in the specification.

Proof of the unauthorized absence.—The proof of this fact is the same as that required to establish the offence of absence without leave under the previous Article. If it is alleged that the offence was committed when the accused was on leave of absence or furlough, the written authority, or its substance, should be put in evidence, with proof that the accused failed to return at the time therein fixed.

Proof of the intent.—Except where established by a specific declaration of the same by the accused, the fact that he absented himself *animo non revertendi* is proved as a presumption from some one unequivocal fact, as an unexplained long-protracted absence without authority, or—more commonly—from a combination of circumstances having a similar significance. The more familiar of such circumstances have already been instanced as illustrating the definition of desertion, and need not be repeated.

Written evidence—Charging desertion distinguished from proof of it.—It is important to remark that a note or entry upon a muster-roll, morning report book, descriptive list or other official certificate or statement, to the effect that a soldier has deserted, is no proof whatever of the intent essential in desertion, nor admissible in evidence to establish the offence upon a trial by court-martial. In this case, as in that of an absence without leave, the entry or record is but a *charge* of the offence, not evidence of its commission.

Defence.—The accused may show in defence that he has neither received pay in the service nor been legally enlisted therein, and is, therefore, not amenable under this Article. Or he may show that his absence was not unauthorized: and it will be a good defence that he was absent in good faith by the permission of a superior, although the latter may have had no authority to allow such absence. So it will be a good defence, as negating the existence of the *animus* of desertion, that the accused, being absent by authority, was prevented from returning, at the expiration of his leave or furlough, by serious disabling illness; but this defence must, if practicable, be sustained by the evidence of a medical officer of the army, or, in the absence of such an officer, a civil physician. It will similarly be a sufficient defence that the absence of the accused was caused by his being (involuntarily) taken prisoner and held as a prisoner by the enemy; or that it was the result of his having been arrested and detained in confinement by the civil authorities.

It will also be a good defence that the deserter has been restored to duty by competent authority under par. 132 of the Army Regulations, which clearly contemplates that, upon such restoration, a *trial* shall be dispensed with; the offence being practically condoned.

It would further be a complete defence, that the accused gave himself up under and within the terms of a proclamation of the President, offering amnesty or exemption from trial to soldiers absent in desertion if duly returning to the service. It must appear indeed that the accused has complied with the *conditions*, if any, of the pardon offered—as, for instance, that he returned voluntarily and within the specified time.

Upon the defence the accused may put in evidence any facts tending to negative the presumption that he

absented himself with the *intent* of desertion; as, for example (in addition to those above indicated), the fact that he absented himself when under the influence of liquor; that when he departed he left a considerable amount of pay due him that would be forfeited upon desertion; that he had not proceeded far or with haste when arrested; that his real object, though illicit, was one involving only a mild criminality and a temporary absence, as the obtaining of liquor at a neighboring town, ranch, etc.; that he returned, after a brief absence, voluntarily, and not because induced by privations, etc.

Extenuating circumstances.—The accused may also exhibit in evidence facts and circumstances which, though not constituting a defence, may avail to extenuate his offence with the court or the reviewing officer. Such as—to cite instances from the General Orders—that he absented himself in good faith, under a claim, honest and not without some foundation, that his term of service had expired; that he had been subjected to cruel or arbitrary punishment, or other oppressive treatment by his superiors; that he had been urged to his act by the continued hostility of comrades; that he had been advised or incited to desert by an officer of the command; that his rations had been for a considerable period deficient in quantity or quality; that he had not been furnished with proper quarters, or sufficient clothing or blankets, especially in winter; that his pay had been for an unreasonably long period in arrears; that he was young and inexperienced in the service, and had been influenced by the bad advice or example of older soldiers or of a non-commissioned officer deserting with him; that he had never been made acquainted with the Articles of War and did not comprehend the gravity of

the offence; that he surrendered himself as deserter after but a brief absence.

Punishment.—The Article leaves the punishment to the discretion of the court. In our Army at present the usual sentence for desertion in time of peace is—dishonorable discharge* and forfeiture of all pay and allowances, with confinement at hard labor in a military prison, limited by G. O. 16 of 1895 to a maximum of from three months to five years according to the period of absence and other conditions mentioned in the Order, and such other circumstances of aggravation or extenuation as may have characterized the offence.

In time of *war*, when the offence is made *capital* by the Article, desertion is visited with especial severity. Desertion to the enemy is almost invariably punished with death; and in the late war this penalty was imposed and executed in repeated cases where the party had enlisted with the view of securing a *bounty* and thereupon quitting the service.

Legal consequences of desertion.—Irrespectively and independently of the *punishments* which are or may be awarded by a court-martial upon conviction of desertion, there are certain legal consequences resulting from the commission of this offence of which some notice is desirable to a completion of the present subject. These consequences, which do not require to be expressed in the sentence, but which result *by operation of law* upon a conviction, are mainly as follows: 1. Forfeiture of all pay and allowances due at the date of desertion, and all accruing during the period of unauthorized absence—as prescribed by pars. 132 and 1381, A. R.; 2. Forfeiture of all “retained pay,” if any; 3. Forfeiture of savings deposited with the Pay Department—as prescribed by Sec. 1305, R. S.; 4. Liability to make good to the United States the time lost by the desertion—as prescribed by Art. 48;

* As to the summary discharge “without honor” of deserters see G. O. 180 of 1898.

5. Loss of his appointment if a non-commissioned officer;
 6. Forfeiture of rights of citizenship, and disqualification for holding office under the United States, imposed by Sec. 1998, R. S.; 7. Ineligibility for reappointment to the Army, in a case of an *officer* dropped for desertion under Sec. 1229, R. S.; 8. Ineligibility for re-enlistment, by a soldier, prescribed by Sec. 1118, R. S.; 9. Qualified ineligibility for admission to the Soldiers' Home, as indicated in Sec. 4822, R. S.; 10. Incapacity to receive a bounty-land warrant, as provided by Sec. 2438, R. S.; 11. Forfeiture of right of pension. (Act April 26, 1898.)

Reward for arrest of deserter.—By par. 122, A. R. of 1889, as amended in General Orders, a "reward of sixty dollars" * was declared to be payable "to any civil officer having authority under the laws of the United States, or of any State, Territory, or district, to arrest offenders" (see Act of Oct. 1, 1890, s. 2), for the arrest and the delivery to the proper authority at a military station . . . of any soldier . . . liable to trial and punishment for desertion." The reward is not now payable to a civilian who is *not* a "civil officer," nor to an officer or enlisted man of the army. [Otherwise as to the similar reward payable "for the capture of an escaped military convict"—par. 128, A. R.]

If the reward has been paid before the alleged deserter is brought to trial, and upon trial he is *convicted*, the amount of the reward is stopped against his pay. Such stoppage, however, cannot be made where he is acquitted, nor where he is found guilty of the minor offence of absence without leave. Nor, though he be convicted, can the stoppage be made if such conviction is disapproved by the competent reviewing authority, and thus nullified in law.

Other Articles of War relating to desertion.—The offence of desertion, it may here be noted,

* The Army Appropriation Act of August 6, 1894, and subsequent Appropriation Acts, provide that "*no greater sum than ten dollars*" shall now be paid.

is made the subject of three Articles of War in addition to those—Arts. 47 and 48—above specified. Thus Art. 49 declares that an officer who, having tendered his resignation, permanently quits his post or duties before being officially notified that his resignation is accepted, “shall be deemed and punished as a deserter.” Art. 50 declares in substance that the re-enlisting by a soldier, “without a regular discharge from the regiment, etc., in which he last served,” shall constitute a desertion. The object of this provision evidently was to preclude the notion that a soldier could be relieved from liability as a deserter because, on abandoning his regiment, he proceeded to re-enter the service in another, or in other words, that he could be excused from repudiating his pending contract by substituting another in its place. Art. 51 makes punishable the advising or persuading of any officer or soldier to desert the service; *advising* consisting merely in counselling the party to commit the offence, while *persuading* imports the actual causing of a desertion by means of the influence employed.

VII. THE THIRTY-EIGHTH ARTICLE.

[Drunkenness on Duty.]

ART. 38. *Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.*

Construction of the Article.—The principal questions which have arisen under this Article have been raised upon the meaning of the terms—“found on,” “drunk” and “duty.” To determine in what consists the specific offence, it will be necessary to interpret these several expressions.

“*Found on*.”—From the use of these words it is to be inferred that the drunkenness of the offender must ex-

hibit itself after he has entered upon, and while he is on, the duty. The Article does not require that the accused shall have become drunk, but that he shall have been found, *i.e.*, discovered or perceived, to be drunk, when on the duty, and it does not therefore necessarily follow that his drunkenness shall have commenced after the duty has been entered upon. To permit an officer or soldier, when inebriated, to go upon any duty of importance, while in general involving an injustice to the individual, is also a reprehensible act and a military offence in the superior who knowingly suffers it. But the fact that he was already intoxicated cannot render the party himself any the less legally liable under the Article, if, after having entered upon the duty, his intoxication continues and his condition is detected.

But, on the other hand, a soldier (or officer) is not "found" drunk in the sense of the Article, if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all. His offence is then chargeable, not under this but under the 62d Article.

"*Drunk.*"—The state of drunkenness contemplated by the Article may be said to be one which incapacitates the officer or soldier, mentally or physically, for the proper performance of the duty upon which he has entered. There are of course various grades of intoxication, and under those which are less pronounced the party may be able to perform the duty imperfectly—to get through it after a fashion, but not *properly*. In any such case he is in general to be held to be "drunk" in the sense of the Article equally as if he were totally incapacitated; a due, proper and full execution being that which is required of him, and his offence being complete where by becoming intoxicated he has rendered himself

either more or less incompetent for the same. And, as a general rule, in proportion as the duty is more difficult or important, and especially in time of war, a less degree of intoxication may be held sufficient to constitute the offence.

It should be observed that it is not essential that the drunkenness be caused by the drinking of spirituous beverages. The offence is complete whether the party found drunk be under the influence of liquor, opium or other intoxicant.

“*Duty.*”—The connection in which this term is employed—“guard, party or other duty,” induced at one time the construction that only such duty was meant as was similar in its nature to guard duty; that is to say, some regular and stated duty for which the officer or soldier has been formally *detailed*. But in a General Order of 1856 it was specifically held by the Secretary of War that the term *duty* included “all descriptions and circumstances of duty.” Thus not only is drunkenness on guard, drill, police, parade, inspection, muster, court-martial, or any other duty or exercise of routine, within the contemplation of the Article, but also drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank, or general military obligation.

The latter species of duty may sometimes be of a *continuous* character. Thus an *officer of the day* is liable to charges under the Article if found drunk at any moment of his tour of duty, whether in the day time or at night. Again, *in time of war*, and especially in the field before the enemy, the status of being *on duty*, in the sense of this Article, may be uninterrupted for very considerable periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war,—“an officer, when his

regiment is in front of the enemy, is at all times *on duty*."

What is military duty.—The term "duty," as used in this Article, means of course military duty. But—it is important to note—every duty which an officer is legally required, by superior military authority, to execute, and for the proper execution, of which he is answerable to such authority, is necessarily a military duty, and this although it be a duty which a civilian could with equal fitness be employed to perform. Thus an officer or soldier engaged in engineering operations not connected with military works, under the orders of the Chief of Engineers of the Army, or one duly serving upon a *posse comitatus* in aid of a civil official, or acting as an Indian agent under Sec. 2062, R. S., would, if disqualifying himself by intoxication for the proper performance of the service devolved upon him, be amenable to charges under the present Article.

Proof of the drunkenness.—The simplest and most satisfactory evidence of the fact of drunkenness will be the statements of witnesses as to the appearance, condition, manner, language or acts of the accused, or other attendant circumstances from which a state of intoxication may be presumed. But as drunkenness is to a great extent a matter of common observation, it is held not to be an infringement of the rule of evidence—that a witness (not an expert) shall not be asked or allowed to give his *opinion*—for witnesses, when interrogated as to the condition of the accused, to state as a fact (subject to cross-examination), that he "*was drunk*."

Defence.—The accused may show that the liquor or drug had been taken by him as a medicine only, and that because of the strength of the dose, a weak head, depreciated health, the heat of the weather, fatigue, or other cause, it had overcome him. But he should also

prove that the same had been prescribed by a medical officer or physician, since an officer or a soldier is not authorized to risk incapacitating himself for duty by taking medicine at discretion.

Finding.—Where the evidence shows that the accused was drunk but not on duty, the court may and properly should find him guilty of the specification, *except* as to the averment in regard to the duty, and not guilty of the charge but guilty of “conduct to the prejudice of good order and military discipline.” This is one of the cases in which such form of finding is especially useful and appropriate.

VIII. THE THIRTY-NINTH ARTICLE. [Offences of Sentinels.]

ART. 39.—*Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.*

Object of the Article.—The purpose of this provision, which is of ancient origin, is to secure on the part of sentinels that alert watchfulness and steadfastness which are the very essence of their service. These qualities, important as they are to the preservation of good order, and the protection from depredation or loss by fire of public property, at a military station, are, in time of war, absolutely essential to insure a camp or post against the danger of surprise and capture by a hostile force. Grave as must be on all occasions the offences specified in the Article, it is in the field before the enemy that they become of the most aggravated character, and it is especially to prevent their occurrence at such critical seasons that they are made punishable with *death*.

Sleeping on post.—As to the proof of this offence—it

should first be shown by the officer or non-commissioned officer, whose duty it was to detail and to post the sentinel, that he was duly detailed and duly posted as charged. That he was found asleep should most properly be proved by the testimony of the officer of the day, or officer or non-commissioned officer of the guard (or by some member or members of the guard or patrol then present), by whom he was discovered in that condition. That he was actually asleep may be shown by some such fact or facts as the following, *viz.*:—that the accused (if the offence occurred, as it usually does, in the night) failed to challenge the officer or party approaching his post; that he was found lying down, or in a position favorable to sleep, instead of standing or walking his beat; that he was snoring or audibly breathing as if in sleep; that he did not answer when spoken to, once or repeatedly; that he did not apparently become conscious till touched, shaken, etc.; that when roused he was stupid; that he had dropped or laid aside his musket, or that he allowed it to be taken from him without resistance, etc.

Leaving post before being regularly relieved.—After showing the due detail and posting of the accused, this offence is usually established by evidence that, when the post was officially visited during a tour of duty of the accused, he was not found upon it, and that he had not been for any cause relieved by any officer or non-commissioned officer of the guard or other competent authority. Or it may be shown that he was, under similar circumstances, discovered to be at a particular place quite other than his post, or was seen *off* his post and at a material distance from it.

Meaning of "regularly relieved."—The Army Regulations (expressing a custom of the service) prescribe that a sentinel's tour of duty, between reliefs, shall, as a

general rule, be two hours; and they further direct as to the mode in which a sentinel shall be relieved at the end of a tour. In case, however, of illness or other urgency, occurring pending a tour, a sentinel may be relieved temporarily or altogether, upon application transmitted in the usual manner to the officer of the guard. A sentinel, however, cannot "relieve" himself, nor can he "regularly" be relieved by another sentinel except in the presence and under the supervision and direction of an officer or non-commissioned officer of the guard.

Defence and extenuation.—There is, properly speaking, *no defence* to a charge for either of the offences made punishable by this Article. In extenuation, however, and with a view to reduce the measure of the punishment, such facts may be shown by the accused as that, when posted as a sentinel, he was ill or otherwise disabled; or that he had already been overtasked by excessive guard duty or other continuous service; or that he had temporarily left his post under an extraordinary stress of weather; or that, in irregularly relieving himself or allowing himself to be relieved, he had but observed a usage sanctioned by his official superiors; or that, being a recruit, he had not been properly instructed in his duties as a sentinel.

IX. THE FORTY-SECOND ARTICLE.

[Misbehavior before the enemy, and Pillaging.]

ART. 42. *Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post*

or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

This Article, of which some of the provisions may be traced as far back as the code of Richard II., denounces two classes of offences — 1. Misbehavior before the enemy, and other kindred misconduct in war; 2. Plundering or pillaging.

Misbehavior before the enemy.—This offence may consist in:

1. Such acts by a *commanding officer*, as—needlessly surrendering his command, or abandoning it before the enemy; abandoning, or absenting himself from, his post when expecting an attack; failing to advance against, attack, or resist the enemy, when ordered or properly called upon to do so; retreating, or withdrawing his command, before the enemy, without sufficient cause; conducting a retreat in a disorderly manner and without the proper precautions; failing to rally his force when in disorder but capable of being rallied; procuring himself unnecessarily to be relieved from the command when about to be engaged; failing to succor, support, or relieve another command, when ordered to do so, or when circumstances make it a duty.

2. Such acts by *any officer or soldier*, as—failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy.

The “enemy” may be hostile Indians, and the offence

be committed in the course of warfare with Indians equally as in a foreign or a civil war.

Misbehavior not necessarily cowardice.—Misbehavior before the enemy is often charged as “Cowardice;” but cowardice is simply one form of the offence, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant.

“Shamefully abandoning a fort, post, or guard.”—Of this form of misbehavior before the enemy, it is to be said that whether or not the abandoning is to be regarded as “*shameful*” will depend upon the circumstances of the situation. As a general rule, a commander is justified in surrendering or abandoning his post to the enemy only at the last extremity—as where his ammunition or provisions are expended, or so many of his command have been put *hors du combat* that he can no longer sustain an effectual defence, and, no prospect of relief or succor remaining, it appears quite certain that he must in any event presently succumb. In general, every available means of holding the post and repulsing the enemy must have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence of “shamefully”—*i.e.*, inexcusably and disgracefully—abandoning, specified in the Article.

The term “post,” as here used, has reference to some point or position, whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend. The term “*guard*” is general,

but would appear to contemplate an advance guard, or other outer or special guard, rather than the ordinary interior guard of a camp or station. The abandonment of a picket post or line, without using every reasonable endeavor to hold it and to retard as long as practicable the advance of the enemy, thus enabling the main body to prepare against his approach, would be a marked instance of the offence of abandoning a "*post or guard*," specified in the Article.

"*Speaking words inducing others to do the like*."—The term "the like" is construed as referring not merely to the act last specified (abandoning a fort, post, etc.), but to any one or more of the acts previously recited in the Article. By "words," as here employed, is included any verbal argument, persuasion or threat, language of discouragement or alarm, or false or incorrect statement in regard to the condition or operations of the troops or the movements of the enemy, which, whether or not intended to have such effect, may avail to bring about an unnecessary surrender, retreat, or other dereliction before the enemy.

"*Casting away his arms or ammunition*."—The term "his" means here (as in Art. 17), furnished him by the government for his equipment and use in the service. The offence is completed by the act of "casting away," whatever its inducement, whether it be to aid flight or relieve weariness, or a mere wanton renunciation. That the arm or quantity of ammunition which the party is accused of having cast away, was thrown aside at the order of a commander, in requiring his command to lighten themselves of *impedimenta*, in order to facilitate a more rapid retreat when pursued by the enemy, or for other military purpose, will of course constitute a defence to the charge.

"*Quitting post or colors to plunder or pillage*."—This

offence, which, if permitted to be indulged in by troops, would convert legitimate warfare into mere marauding and a disciplined military force into a band of stragglers and freebooters, is one of those which are regarded as the most immediately fatal to the discipline and *morale* of soldiers, and as calling in all cases for severe punishment. It has been stigmatized as a grave military crime in all the codes of Articles from a very early period. The General Orders, published during the late war, abound with declarations of commanders, denouncing and prohibiting pillaging and lawless foraging, and holding officers responsible for the conduct of their commands in this particular. Repeatedly is the distinction pointed out between the authorized taking of supplies or making of requisitions for the public use, in accordance with law or the custom of war, and the unauthorized and illicit appropriation of private property by officers, soldiers, or camp-followers.

The term "*post*" is evidently used here in the most general sense, but as referring to a point for the time fixed. "*Colors*," on the other hand, is viewed as referring mainly to a regiment or other body on the march or operating in the field against the enemy.

To constitute the offence there must exist the intent indicated in the Article by the words—"to," *i.e.* in order to, "plunder and pillage." This intent was expressed still more clearly in the corresponding Article of 1775 by the words—"to go in search of plunder." It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property; and whether the private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence committed. The intent being complete, it is not essential that the property should

actually be taken: that it is taken, however, will of course be the strongest evidence that the offender left his station for the purpose of taking it.

The offence is no less committed though the quitting of the post, etc., is by a *quasi* authority; as where soldiers go forth for the purpose of marauding under the orders of or in company with an officer or non-commissioned officer. In such a case, the act of the superior being prohibited and lawless, the legal offence of the soldier is as complete as if he had proceeded alone and of his own motion: his punishment, however, will properly be less severe than that adjudged his superior.

Punishment.—The offences denounced by this Article, occurring as they mostly do in time of war, and generally in the presence of the enemy, and involving the gravest violation of orders or of the military obligation, have always been made punishable with the extreme penalty of death. During the late war capital sentences were repeatedly adjudged for marked instances of violation of this Article. In cases of less gravity the dismissal of the officer, or dishonorable discharge of the soldier, was sometimes made by the court *ignominious*, by requiring that the same should be accompanied by a stripping off of insignia of rank, drumming out, shaving of the head, or—in cases of cowardice—placarding with the word “coward” or branding with the letter “C.”

X. THE FORTY-FIFTH AND FORTY-SIXTH ARTICLES.

[Relieving, and Communicating with, the enemy.]

ART. 45. *Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.*

ART. 46. *Whosoever holds correspondence with, or gives*

intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

The offences made capitally punishable by these Articles are akin to the civil crime of treason. That they apply—under the general description, “*Whosoever*”—to civil equally as to military persons, has been noticed, in Chapter VI., as the construction supported by the weight of authority.

Forty-fifth Article—*Relieving the enemy with money, victuals, or ammunition.*—The word “relieves” is employed here, not merely in the restricted sense of *alleviate* or *succor*, but also in that of *assist*. In the connection in which it is used it may be construed as substantially equivalent to *furnish* or *supply*. The mere giving or selling to the enemy of any of the things specified, though the same may not really be *needed* by him, is, so far, an assistance rendered him, and thus an offence within the Article. That the thing furnished is *exchanged* for some commodity returned by the enemy does not affect the legal quality of the act.

It is to be observed that the enemy must be *actually* relieved—reached by the succor or assistance tendered. An *attempt* to relieve him, not successful, will not constitute the special offence.

The word “enemy,” as has been noticed under other Articles, includes, not only an enemy with whom we are waging either a foreign or civil war, but also an Indian tribe or band in open hostility to the United States, against which hostile operations are pending. “Enemy” also includes not only the government or army of the enemy but individuals of his people. In the language of the United States Supreme Court—“All the citizens or subjects of one belligerent” are “enemies of the government and of all the citizens or subjects of the other,”

both in "civil and international wars."* Relief, therefore, afforded to individuals is relief to *enemies*, and, so far, relief to *the enemy* considered as a nation or government.

The enumeration in the Article of "money, victuals, or ammunition" is an imperfect one. Some such addition as *or other thing*, or *or otherwise*, is required to complete and render fully effective the enactment. The furnishing of money to the enemy is no less a relieving of him where a consideration is received in return than where the amount supplied is a free gift.

Knowingly harboring or protecting an enemy.—This offence may be defined as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, etc., a person known as or believed to be, and who is in fact, an enemy. In the cases as published in General Orders, this offence has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force, or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.

Defence.—The only justification of an act made punishable by this Article would be the order or sanction of the President or of a competent military superior, or an authority conferred by an Act of Congress.

Forty-sixth Article.—This Article makes punishable the two distinct acts of holding correspondence with and giving intelligence to the enemy; and all material illicit communications made to the enemy will be found to be included within one or the other description.

Holding correspondence with the enemy.—The word "*correspondence*" is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of

* The Venice, 2 Wallace, 418.

course communications in print and telegrams. The term, however, is not to be viewed as implying that there has been, or should be, a mutual interchange of letters or communications between the accused and the enemy; nor is it necessary that the communication which is the occasion of the charge should be an answer to a previous one from the party to whom it is addressed. The offence may consist in the sending of a single letter, and this may be the first and the only one that has passed, or been attempted to be transmitted, between the parties.

Any correspondence with the enemy being a violation of the absolute rule of non-intercourse pertaining to a state of war, the Article, naturally, does not characterize the correspondence, the holding of which is made punishable, as treasonable, hostile, injurious, etc., but makes it an offence to hold *any correspondence whatever*. Not only therefore is correspondence by which valuable information is imparted or important public business transacted, as well as correspondence calculated to stimulate or encourage the enemy, properly chargeable under the Article, but also correspondence of a comparatively harmless character—as the writing of a letter relating to private or domestic affairs. And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence.

It is further to be observed that the crime is complete in the writing or preparing of the letter or other communication, and the committing it to a messenger, or otherwise putting it in the way to be delivered. It is not essential that it be received by the person for whom it is intended, or that it reach its place of destination. If it be intercepted while in transit, the legal character of the offence will not be affected.

Giving intelligence to the enemy.—This offence will

consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise, information in regard to the number, condition, position, or movements of the troops, amount of supplies, acts or projects of the government in connection with the conduct of the war, or any other fact or matter that may instruct or assist him in the prosecution of hostilities.

It is necessary that the enemy shall have been *actually informed*. If therefore the intelligence fails to reach him, this offence is not completed, though the offence of holding correspondence may be. It would seem also that the facts communicated should be in part at least true, since, if they are entirely false, *intelligence* cannot be said to be given.

Either directly or indirectly.—These words are construed as applying to both the acts made punishable, not to the last one only. The modes of holding correspondence and giving intelligence already instanced have been mainly of a direct character. It was, however, the indirect modes which, during the late war,—as in previous wars,—principally exercised the vigilance of our military authorities. The proceeding of this sort which it was found especially necessary to denounce and prohibit was the publication in newspapers of particulars in regard to the numbers, organization, position, operations, etc., of the Army, by which information might readily be communicated to the enemy; and in several instances the offence thus committed was made the subject of charges under the present Article, or of trial by military commission. The publishing by way of advertisement in newspapers, of “Personals,” by means of which an indirect correspondence was maintained with individuals within the enemy’s lines, was also expressly prohibited.

Proof.—Where the correspondence has been carried on, or intelligence supplied, by a written communication in the *handwriting* of the accused, it will be necessary to prove this in the usual manner, as indicated in the Chapter on Evidence. Where the communication is in *cipher*, the possession of a key, or a knowledge of and ability to employ the cipher, must ordinarily be brought home to the party.

Defence.—Under a charge of holding correspondence, where the communication referred solely to private or domestic affairs, it would be a good defence to show that the same was authorized under regulations such as those which prevailed during the late war, by which communications of such a character were permitted to be exchanged with the enemy through the lines at Fort Monroe.

A not unusual form of defence to a charge of giving intelligence to the enemy, where verbally communicated, has been that the same was furnished *under duress*. But to constitute this defence the duress must have been such as to put the party in reasonable fear of present death if he refused to give the information required of him. Any form of bodily constraint or injury, not immediately endangering life, although it might be admitted in evidence in mitigation of punishment, would not amount to a *defence* in law.

XI. THE FIFTY-SEVENTH ARTICLE.

[Forcing a Safeguard.]

ART. 57. *Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States forces a safeguard, shall suffer death.*

Safeguard defined.—The term safeguard, as here employed, signifies a special privilege of protection for person, household, or property—all or either—against military marauders or other disorderly parties, granted by a military commander to private individuals, (deemed to have a claim upon the protection of the government, or whose premises or property it is thought desirable to protect in the interests of military discipline or otherwise), to corporations, or to hospitals or other public institutions or places. In according this privilege, the commander either causes a guard (a soldier or soldiers) to be posted at the dwelling of the applicant or other proper place, or he furnishes the proper person with a formal certificate or order in writing, subscribed by him in his official capacity to the effect that a safeguard has been granted, stating its subject, scope, and duration, and calling upon the military to respect it. Or the commander may furnish both guard and certificate: indeed, in practice, a person to whom is accorded a written protection is generally also supplied with a guard to assure and enforce it. In common military parlance the term “safeguard” is applied somewhat indifferently to the writing or order and to the sentry or guard. It is the former, however, which is intended by the term at international law, though, strictly speaking, either is but the evidence of the existence of the privilege.

Revocation of safeguard.—A safeguard is always subject to be revoked for good cause, either at the discretion of the authority from whom it proceeded or his successor in command, or by the order of a superior commander or the President. A controlling cause would be the treason, treachery, or disloyalty of the recipient, which, when discovered, would exhibit him as no longer worthy of the special protection afforded.

The offence of forcing a safeguard.—The forcing of a safeguard will consist in a wilful disregard and violation of the protection, to the injury of the person, property, etc., to whom, or for which, it has been accorded. In a majority of the cases published in General Orders, the offence consisted in plundering, or in larceny or robbery, committed upon premises which had been duly placed under the protection of a safeguard; the act being sometimes accompanied by violent or threatening conduct toward the inmates. The thrusting aside, disarming, resisting, or otherwise assaulting, of a sentinel or guard posted for the purpose of enforcing a safeguard, in connection with a failure to comply with his order against entering or interfering with the house, property, etc., placed under the protection, would be another marked form of a violation of the Article.

It is of course essential to the specific offence that the accused should have known of the existence and purpose of the safeguard which he is accused of forcing. In the absence of positive or presumptive evidence of such knowledge, his act will properly be charged under some Article—as the 42d or 62d—other than the present.

XII. THE FIFTY-EIGHTH ARTICLE.

[Jurisdiction of crimes in war.]

ART. 58. *In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding by shooting or stabbing with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a*

general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed.

Nature of the jurisdiction conferred.—Prior to 1863, courts-martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced “good order and military discipline.” In that year, however, was enacted the statute incorporated in the above Article, by which, “in time of war, insurrection, or rebellion,” the graver civil crimes are made cognizable by general court-martial, when committed by military persons, without regard to whether such crimes prejudice military discipline or affect the military service. The main object of the Article evidently was to provide for the punishment of the crimes of soldiers in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.

Limited as it is by the Article, the jurisdiction can be exercised only during the period of the war, etc., as inaugurated and terminated by the action of Congress or of the President. Such jurisdiction, while it continues, is not exclusive of that of the civil tribunals, but concurrent therewith. [See G. O. 40 of 1898.]

The crimes specified in the Article.—These crimes will be defined in the following order: Murder, Manslaughter, Mayhem, Rape, Robbery, Arson, Burglary, Larceny, Assault and Battery with intent to kill, etc. For any-

thing further than definitions and the details of definitions, the student must be referred to the treatises of the approved authorities on criminal law and the rulings in adjudged cases. It is to be observed that as these crimes are not specifically defined in the Article, or elsewhere in the written military law, they are to be interpreted by the doctrines of the *common law*. As already noticed, military law recognizes no *degrees* of crimes.

Murder.—Murder is simply *homicide with malice aforethought*. The definition of murder is completed by adding that, to constitute the crime, the *death must occur within a year and a day* after the date of the act. This is the rule for both species of homicide, murder and manslaughter, at common law. Where the death is not shown to have followed within a year and a day, the law presumes that the wound or injury was not the occasion of the death—that it proceeded from some other cause.

It may here be noted that where the act which is the cause of the death is committed in one State or district, while the actual death occurs in another, it is the former place which is in law, as held in Guiteau's case, the *place* of the murder or homicide.

Malice aforethought.—The term *malice*, as ordinarily employed in criminal law, is a strictly legal term, meaning, not personal spite or hostility, but simply the *wrongful intent* essential to the commission of crime. When used, however, in connection with the word "aforethought" or "prepen-*se*," in defining the particular crime of murder, it signifies the same evil intent as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in

the view of the law, a malignant or depraved nature. The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either "express" or "implied;" *express*, where the intent—as manifested by previous enmity, threats, the absence of any or of sufficient provocation, etc.—is to take the life of the particular person killed, or, since a specific purpose to *kill* is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death; *implied*, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person—as where a party intending to kill by shooting, etc., one person actually hits and kills another; or, when detected in a burglary, fires his pistol in the dark to aid his escape and kills an inmate of the house; or, being engaged in a riot, fires indiscriminately and kills some one; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, etc. Thus where a soldier resists a military superior, when legally engaged in making an arrest or executing any other duty, and in resisting kills him, though not purposely, he is guilty of murder in law.

In every case of apparently deliberate and unjustifiable killing, the law *presumes* the existence of the malice necessary to constitute murder, and devolves upon the accused the *onus* of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder, otherwise it will be held to be murder in law.

Justifiable and excusable homicide.—The definition of Murder is well illustrated by the two defences apposite to this charge, viz.: 1. That the killing was not murder

but manslaughter; 2. That it was not felonious but justifiable, or excusable, in law. The distinction between murder and manslaughter will be noted presently. Homicide is said to be "justifiable" when committed by a public officer in the due execution of the laws or administration of public justice, or when committed by any person in the due prevention of a violent crime. Thus homicide is justifiable where committed by an officer of the army, or at his instance, in the suppression of a mutiny or other violent disorder, or in the capture of an escaping prisoner or deserter, where no other available means are adequate for the purpose. Homicide is in law "excusable" where it is the result of accident or mishap, or where it is committed in self-defence.

Self-defence.—"A man may oppose force to force in defence of himself, his family or property." Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defence of the person will be justified where the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending. In defence of property, killing, as a means of preventing a trespass unaccompanied by violence, will not be justified. Where the trespass is serious, as in a case of housebreaking with evident felonious intent, the occupant, especially if the breaking be in the night, will be justified in taking life in protection of his domicile.

Manslaughter.—This crime is defined as an *unlawful killing without malice aforethought expressed or implied*. It is this absence of malice aforethought which distinguishes manslaughter from murder; its commission being ascribed to the "infirmity of human nature,"

and not to a depraved or wicked heart. The only *malice* in manslaughter thus is the wrongful intent which is an ingredient in crime in general.

The authorities specify two kinds of manslaughter—*voluntary* and *involuntary*. “Voluntary” manslaughter (the more usual of the two) is that which is committed in a moment of excitement or while under the influence of passion, and commonly either in the course of a sudden *fighting* or upon some immediate strong *provocation*.

To determine whether an act of homicide is murder or voluntary manslaughter, the main test is the quality of the provocation by which the act was induced. Mere words, however gross or insulting, will not justify taking life, and where a homicide is committed under no other provocation than irritating language, the killing will be murder in law. The same is true of gestures, unless they be of a character manifestly threatening to life—as where a pistol or other deadly weapon is evidently attempted to be drawn and used: in such case the crime committed may be reduced to manslaughter. In any case where the provocation, though material, is not excessive, as where a bare trespass is committed on property other than a dwelling, or where the person is assailed but not seriously, or where a more considerable battery is committed but by a party not accountable—as a drunken man,—the law will in general hold the killing to be not manslaughter but murder.

“Involuntary” manslaughter consists in the accidental and unintentional causing of death, either by the doing or attempted doing of an act which, though unlawful, is not felonious or highly criminal or likely to be dangerous to human life, or by the doing of a lawful act in an incautious or negligent manner. Thus, where a superior, by the exercise of an unduly severe measure of discipline or the infliction of an excessive punishment, causes the

death of an inferior, such superior is chargeable with involuntary manslaughter. And the legal crime will be the same where the superior causes the death of another by reason of negligence in not properly regulating the use of fire-arms in his command—as in target firing or artillery practice.

Mayhem.—Mayhem, maiming, or maim, at common law, is the violently inflicting, upon any part of a man's body, of such an injury as to render him less able to fight or defend himself against his adversary; the gravamen of the offence being that the act permanently disables the person "to fight in defence of the king and country, and as a soldier protect himself on the field of battle." Thus, while to cut off or disable a hand, an arm, or a leg, or to strike out or blind an eye, was a mayhem at common law, to deprive a person of an ear or of his nose was held *not* to be, since such an injury would disfigure only and not incapacitate for war-service.

To constitute mayhem, it was not deemed essential that the injury should be inflicted upon another; a self-mutilation being regarded as within the definition. Thus a soldier who deprived himself of the use of a member necessary to qualify him for the military service, was considered to be chargeable with a mayhem.

Rape.—Rape is defined as the unlawful carnal knowledge of a woman forcibly and against her consent. The non-consent on the part of the female may consist and appear in her making resistance till overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance must be useless if not perilous; in her yielding through reason-

able fear of death or extreme injury impending or threatened; in the fact that she is rendered senseless and incapable of resistance by intoxicating drink or a stupefying drug; in the fact that she is imbecile or otherwise *non compos*, or that she is a child under the age of ten—in which case the law presumes that she is incapable of consenting; in the fact that her will has been constrained, or her passive acquiescence obtained, by fraud, surprise, false pretence, or other controlling means or influence.

Robbery.—Robbery is a felonious taking of his property from the person, or presence, of another, by means of violence, or putting in fear. It is distinguished from *larceny*, in that the taking is aggravated by violence, and is a taking from the person, or, what is equivalent in law, the immediate presence or custody of the party. The term “felonious” refers to the criminal intent—*i.e.*, purpose to steal or *animus furandi*, with which the act must be accompanied. The *taking* must be a taking of personal property of some value; how much is immaterial. The *person* from whom, or whose presence, it is taken need not be its absolute owner; it is sufficient if he has a right of possession as agent, trustee, or bailee. The *force* may consist in any battery or duress sufficient to disable or overcome resistance, but it must be physical; fraud, for instance, will not supply the place of actual violence. The *putting in fear* may be by a display of superior force or numbers, by menace of death or grave bodily harm, or other threat or form of intimidation sufficient to constrain the will.

Arson.—Arson is defined as the malicious burning of the house of another. It is an offence against the security of the habitation and is made punishable mainly

for its protection. Though ordinarily perpetrated under the cover of darkness, the time of its commission—whether in the day or in the night—is wholly immaterial. Further, not being a crime against human life, it is not essential that there be any human being in the building at the time it is fired. The burning must be *malicious*—i.e., committed with a criminal intent; but it need not be actuated by a purpose to injure any particular individual. The “malice” may be express or implied; *express*, where the intent is to burn the particular house which is fired; *implied*, where the burning does not correspond with the precise design of the offender—as where the design is to burn the house of A, and that of B is actually burned instead, or where the burning has resulted from some other felony or criminal act which alone was originally contemplated. There must be an actual burning; an intention to burn not effectuated will not be sufficient. But the burning need extend to but a small portion of the edifice, and that need not be wholly consumed. Thus, in the case of wood, a charring is all that is required. The “house” includes not only the dwelling but such outbuildings as are so contiguous that a burning of the same would endanger the main structure. The crime is complete whether the house is occupied by the owner or by a tenant.

Burglary.—Burglary, at common law, is an unlawful breaking and entering, in the night-time, into the dwelling-house of another, with the intent to commit a felony therein. Like arson, it is an offence, not so much against property as against the peace and security of the habitation, of which Blackstone writes that “the law of England has so peculiar and tender a regard to the im-

munity of a man's house that it styles it his castle, and will never suffer it to be violated with impunity."

The breaking.—This may be actual or constructive—that is to say by a direct physical act of force, or indirectly by means of fraud, artifice, intimidation, or conspiracy with an inmate of the dwelling. A slight force is sufficient to constitute an actual breaking; the opening, removing, displacing, etc., of some fastening or customary barrier to entrance being all that is required. The barrier need not be an outer one: a servant or other inmate may commit burglary by breaking and entering the room-door of the master or mistress of the house, or any member of the family, or of a guest or lodger, with a felonious intent. But where the party enters by a door or window which he has *found open*, there is no breaking, and therefore no burglary.

The entering.—To constitute an entry, it is not essential that the party should personally enter in the ordinary sense of the word; the least entering of any part of the body, as a hand, foot, or even finger, is sufficient to satisfy the law. It is not even essential that any portion of the body should enter the dwelling, provided some instrument, inserted for the purpose of accomplishing the felony, do actually penetrate within it. So an entry may be effected and a burglary completed by means of an innocent third person—as where the wife of the offender or a young child is compelled to pass through a broken window or aperture, and instructed to seize and bring out certain articles of property. What has been said of the breaking of an *inner* door, etc., as well as of *constructive* breaking, applies also to the entering.

The place.—The scene of burglary must be a dwelling-house. This term includes both the place of the actual residence of the occupant of the premises and all such

other appurtenant buildings as are properly *parcel* of the main edifice—*i.e.*, contributory or ancillary to it as branches of the domestic establishment. It is immaterial if the occupant be *temporarily* absent. Thus burglary, like arson, may be committed in the summer upon a house not then occupied but customarily inhabited as a winter residence.

The intent.—The intent in burglary is to commit a felony—that is to say a particular felony, not merely felony in general. In the great majority of cases the act intended is the commission of *larceny*. That the intent has actually existed and impelled the breaking and entering is all that is required to constitute the offence: whether it be executed or not is wholly immaterial. There need not even be an *attempt* to commit the felony, the mere breaking and entering, with the intent to commit it, completing the crime.

Larceny.—Larceny is defined as a taking of personal property from the possession of the owner, without his consent, with intent to appropriate the same. The taking must include not only a seizure but a removal, or—in legal language—both a *caption* and an *asportation*. This asportation, however, is no more than is reasonably implied in the term *taking*, since it may consist in the slightest removal of the article from the place which it has occupied. It is never necessary, to complete the removal in law, that the thief should succeed in getting away with the property. The taking must also be from the possession of the owner—whether absolute owner, or an agent, bailee, or trustee—and without his consent. It must also be a taking of personal property of some recognized value.

The intent.—To constitute larceny the taking must be accompanied with an intent to appropriate the *prop-*

erty (in distinction from the mere possession) to the personal use of the taker, or at least to deprive the owner of it. This intent is the gist of the crime; in its absence there may be trespass but no larceny. The intent must concur with the taking, and is complete if then entertained though afterwards abandoned. Its existence may be presumed from such circumstances as secrecy or other suspicious conduct in the act of taking or the subsequent disposition of the property; the possession not satisfactorily explained of the thing or things stolen; their concealment; the resort to means to avoid detection and punishment—as desertion by a soldier, etc. On the other hand, counter-presumptions may be deduced from such evidence as that the article was taken under a claim of title; that it was designed to be borrowed only; or that it was *found*, after having been *lost* by the owner, and converted in ignorance of the real ownership.

The other offences specified in the Article.—These are simply forms of Battery, with intent to commit certain crimes (homicide and rape), which have already been defined.

The Punishment.—The Article concludes with the provision that the punishment “*shall not be less than the punishment provided for the like offence by the laws of the State, Territory or District in which such offence may have been committed.*” The court is here only precluded from adjudging a punishment less severe than the punishment, or *minimum* punishment, prescribed by the local law. It may, however, adjudge one that is more severe even than the *maximum* punishment so prescribed. So, the court may adjudge, in addition to the penalty fixed by the local law (whether or not itself

increased), a further punishment of a military character appropriate to the case.

XIII. THE FIFTY-NINTH ARTICLE.

[Surrender to the civil authorities of military persons charged with civil offences.]

ART. 59. *When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer and the officers of the regiment, troop, battery, company or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use the utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.*

Principle and purpose of the Article.—It is an established principle of our public law that in time of peace and on common ground the military authority is subordinate to the civil; and it is further settled that military persons are amenable in their civil capacity to the civil jurisdiction for breaches of the criminal law. In recognition of these principles and to facilitate the exercise of such jurisdiction this Article has been enacted. Though in form an injunction upon commanding officers, etc., its general purpose, as expressed by the court in a leading case, is “to aid the civil authorities in the administration of justice, and to place it out

of the power of a criminal to escape the just civil penalties of his acts by entering the military service or claiming its protection while in it." At the same time, by prescribing a condition to be complied with on the part of civil officials and persons, and investing military commanders with a reasonable discretion in accepting their applications, it protects the military from false arrest and arbitrary prosecution.

Nature of the requirement.—The Article devolves it upon commanding or other officers, in time of peace, to cause to be surrendered upon due application to the civil authorities, and to aid them in securing, any such military persons as may be accused of the crimes or offences specified. The designation "any officer or soldier" clearly refers to officers and soldiers under present military command and control, and does not, therefore, include military persons not within such control—as soldiers absent on furlough or deserters. The Article not applying to such parties, it follows, and has been held, that the civil authorities are entitled to arrest and bring to justice a person of such class in the same manner as any *civilian*, *i.e.*, without application to the military authorities.

The term "accused" is not regarded as employed in a technical sense. It is not therefore construed as necessarily meaning charged on oath before a civil magistrate, as evidenced by a *warrant*. This form would indeed be the preferable one, but it is not essential. A charge of an offence contemplated by the Article, specifically made in the *application*, will be a sufficient accusation.

The offences, of one of which the officer or soldier must be accused, are designated in the Article as either capital offences or offences against the person or property of a citizen of a State. Of the latter class of offences

are manslaughter, mayhem, rape, robbery, assault and battery, arson, burglary, larceny, forgery, embezzlement, and malicious mischief. These offences are further described in the Article as such as are "punishable by the laws of the land." The term *laws of the land* means acts of the law-making power—that is to say, statute laws of the State, in contradistinction to municipal ordinances, by-laws, or regulations of police.

Of course where the *place* is under the exclusive jurisdiction of the United States, the State (except in so far as it may have reserved authority to execute process) is without jurisdiction, and the Article does not apply, or only in a limited degree.

Form of proceeding—the Application.—The Article makes it a condition to the surrender of the accused by the military authorities that there shall be an *application duly made by or in behalf of the party injured*. A sufficient form of application will be a written communication or statement addressed to the commanding officer and signed by the party or his authorized representative (or, in the case of his death by homicide, by the public prosecutor or other suitable official, or some citizen), setting forth that a specific offence named, of the character indicated in the Article, has been committed, or is charged and believed to have been committed, by a certain designated officer or soldier of the command, and that his delivery to the civil authorities is required with a view to his trial, or in terms to that effect. Such application may be presented by the person signing, who will properly be accompanied by an official provided with a warrant authorizing him to arrest the prisoner, or may be presented by such official unaccompanied. Or the application may consist simply in the formal *warrant* duly issued on the oath or in behalf of the injured party, and presented for service by a proper officer. If the

warrant, or other form of application, is not sufficiently specific, the commander may require that it be made more so before acceding to the demand.

The application being "duly made," the Article enjoins it upon the commander or officer to use his "*utmost endeavor*" to deliver up the accused. This requirement is of course to be understood in a reasonable sense and with reference to the circumstances of the particular case. Thus if the accused person is not within military control because absent as a deserter or on furlough, nothing more can in general be required of the commander, etc., than to furnish to the civil authority such information in regard to his present whereabouts and the prospect of his return as may be possessed.

Illegality of arrest or surrender without due application made.—Where the arrest is made without a previous application, or after an application not duly made in accordance with the Article, and therefore not acceded to, the law is violated, the act is a trespass, and it is the right as well as the duty of the commander (who owes it to his command to protect them from illegal seizure, and to the United States to maintain its just authority) to retake the prisoner from the custody of the civil official and remand him to his former status. In so doing the commander is entitled and properly required to employ such military force as may be suitable and sufficient to effect such purpose in an orderly manner; but, before resorting to this means, he will properly call upon the civil authorities to return the prisoner, allowing them a reasonable time for the purpose.

This authority cannot indeed be exercised where the officer or soldier has become chargeable with a misdemeanor or disorderly conduct in violation of a city ordinance or police regulation. Here, as already indicated,

he may be apprehended where found, and tried and punished, without previous recourse to the military authorities; nor are the latter empowered to interfere with the due course of law in his case.

It may be added that, while the civil authorities cannot legally arrest, nor the military authorities properly surrender, an accused officer or soldier except as provided in the Article, so, such accused person cannot in general properly be allowed voluntarily to surrender himself. However willing and ready he may be to yield to the course of civil justice, it is not for him to decide whether it is proper for him to do so, but for the commander alone. He should therefore await due proceedings under the Article and the orders of his commander thereon.

Prior assumption of military jurisdiction as affecting the interposition of the civil authorities.—Where a civil and a military court have concurrent jurisdiction of a crime committed by a military person, the court which is the *first* to take cognizance of the same is entitled to proceed; and although the precedence of the civil jurisdiction is favored in the law, yet if this jurisdiction does not assert itself until the other has been duly assumed in the case, its exercise may properly be postponed until the other has been exhausted. Upon the commission of such a crime, the military authorities will in general properly wait a reasonable time for the civil authorities to take action; but if, before the latter have initiated proceedings under the Article, the party is duly brought to trial by court-martial for the military offence involved in his act, the commander may, and ordinarily will, properly decline to accede to an application for his surrender to the civil jurisdiction until at least the military trial has been completed and the judgment of the court has been finally acted upon.

XIV. THE SIXTIETH ARTICLE.

[Frauds, Embezzlement, etc.]

ART. 60. *Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent ; or*

* * * * *

Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof, . . . shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge.

This Article is an elaborate enactment which need not here be inserted in full, since it is proposed to discuss but one of its provisions. Its first and greater portion is taken up with defining and making punishable sundry forms of *frauds*, among which are the making or presenting of false or fraudulent claims against the United States ; and it is under this part of the Article that the offence of duplicating pay-rolls by officers is commonly charged, as also that of claiming pay upon falsified discharges or final statements by soldiers.

Passing to the latter of the Paragraphs, above cited, of the Article, we proceed,—the offence of “stealing” having already been considered under the head of Larceny in treating of Art. 58,—to the important subject of embezzlement.

Embezzlement.—This may be defined as a fraudulent or unlawful appropriation of money or other property,

by a person in a fiduciary capacity,—as a servant, agent, trustee, bailee, etc.,—to whom, in such capacity, it has been intrusted by the owner.

Proof of the offence.—To establish embezzlement in general it is necessary to show—1. That the accused was a servant or agent of the owner of the property, or maintained some fiduciary relation toward him; 2. That he received into his possession money or other property of such owner; 3. That he received it by virtue of his employment or fiduciary relation; 4. That he fraudulently converted it to his own use.

In the case of an officer or soldier of the Army charged with this offence, the fact of his *fiduciary relation* to the United States, as paymaster, quartermaster, commissary of subsistence, military storekeeper, or other disbursing officer, or as quartermaster sergeant, commissary sergeant, hospital steward, etc., is not in general required to be proved by the exhibition of his formal commission, enlistment paper or appointment, but, if disputed, may be shown by the fact of his regularly acting and being recognized as such, by his own admissions of his status as such, by communications or orders addressed to him in such capacity, etc.

The *receipt* and *possession* of the property will commonly be shown by the accounts, returns, etc., of the accused, by the testimony of the officer or other person by whom the money or other property was transferred, delivered, or paid, by the testimony of the public depository, or by the open possession and use or disposition, by the accused, of the property as property of the United States.

The fact of the *fraudulent conversion* in embezzlement may be evidenced by the absconding of the accused with public funds, or his desertion with articles of public property in his possession; by a deliberate falsifi-

cation, as where the party denies that he has ever received the money or property which has been in fact committed or paid to him; by the rendering of a false return or account in which the receipt of the money alleged to have been embezzled is omitted to be acknowledged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely misstated; by a failure altogether to render an account required by statute, regulation or order; by the unauthorized selling, giving, or otherwise disposing of public property to civilians or military persons; by the paying out of public funds to persons not entitled to receive the same; by a neglect to pay sums justly due to employees, contractors, or other public creditors, out of money furnished for the purpose, or to make any other required disbursement; by a neglect to honor proper requisitions for military stores, or a dealing of them out in short or insufficient quantities, notwithstanding that ample supplies have been provided by the government; by a failure to turn over to a successor, on being relieved, the full amount of public property for which the officer is legally accountable; or by any other form of non-performance or mal-performance of the trust devolved upon the party. Further, a conversion may be presumable from an inability on the part of an officer to respond to the demand of an inspector general, or other proper authority, to make actual exhibit of or account for the moneys, stores, etc., for which he is shown by his returns or accounts to be responsible. It may also be presumed from an exhibit made of such moneys, effected by borrowing money from other officers or persons for the purpose of representing, for the moment, an amount of public funds which should be in possession but has in fact been illegally used and is in deficit.

Defence.—Presumptive evidence, such as has been in-

licated, may be met by the proof of facts going to rebut the inference that the property has been fraudulently converted. Thus it may be shown that the funds or stores were captured by the enemy, lost without fault on the part of the officer, or stolen or presumably stolen by a clerk, soldier or other person; or that a deficiency of supplies was caused by wastage or an accidental over-issue.

Special statutory embezzlements.—The statutes of the United States, viz. Secs. 5488, 5491, 5492 and 5496, R. S., have expressly declared that certain acts, when committed by disbursing officers, shall constitute embezzlements of public money and be punishable as such with fine and imprisonment. The acts specified are—the depositing, or withdrawing from deposit, of public moneys except as legally authorized; the failing to deposit the same in the Treasury or with a public depository when required to do so by the proper superior; the loaning of the same without interest; the failing to render accounts for the same as provided by law; the transferring or applying the same for any purpose not prescribed by law; and the acceptance, or transmittal to the Treasury for allowance, of vouchers or receipts for money which has not in fact been paid. These acts, though in terms made the subject of trial and punishment by the United States civil tribunals, are, when committed by *military* disbursing officers, properly taken cognizance of by courts-martial under Art. 60, as being forms of the statutory offence of embezzlement expressly constituted and defined in the laws of the United States. As indicated by the General Orders, cases have not been unfrequent of officers tried and sentenced by court-martial for specific embezzlements of this class.

Rules of evidence in proof of these embezzlements.—1. *No specific intent required to be shown.*—These statutory embezzlements are consummated by the mere commission of the *act* in which the embezzlement in any instance is defined to consist, without regard to the *purpose* or *motive* of the offender. It is the object of the statute law to insure, by every precaution suggested by experience, the safe-keeping and proper disposition of the public moneys: it therefore makes the mere departure from the rules which it has established with this view an offence *per se*, independently of the circumstances or the *animus* of the accused; these being left to affect only the measure of the punishment. It is accordingly no defence that the act was unaccompanied with a design to defraud the United States, or to convert the money to the party's personal use; or that it was done innocently and in good faith but under a mistake of judgment; or, where moneys have been illegally withdrawn or used, that the amount was restored to the proper depositary or otherwise made good before charges were preferred in the case.

2. *Demand and refusal, prima facie evidence of guilt.*—The law,—in Sec. 5495, R.S.,—further expressly lays down a *rule of evidence* to the effect that the refusal of any person, charged with the custody and disposition of public moneys, to pay any draft, order or warrant drawn upon him, by the proper accounting officer of the Treasury, for the public money in his hands, or to transfer or disburse any such money promptly, upon the requirement of an authorized officer, “*shall be deemed, upon the trial of any indictment against such person for embezzlement, as presumptive evidence*” of the commission of the offence. Applying this rule to a military case,—proof of a formal demand upon an officer or soldier in charge of public funds, made by an authorized

superior, to pay over or account for the same, followed by his refusal, or, what is equivalent in law, neglect within a reasonable time, so to do, would be evidence *per se* of embezzlement. Such evidence being produced, the prosecution would not be required to show what had become of the funds, but the burden would be thrown upon the accused to establish that his disposition of the same had been in accordance with law.

Misappropriation—Misapplication—Wrongful disposition.—These forms of offence, also made punishable in the Paragraph of the Article under consideration, are not specifically defined therein, nor are they materially distinguished in practice. Strictly, *misappropriation* may be defined as consisting in the appropriation of the ownership of public property where the same is not intrusted to the party in a fiduciary capacity and the act therefore falls short of constituting an embezzlement; *misapplication* as being an appropriation not of the ownership of such property but of its use; *wrongful disposition* as including any appropriation or application of such property not embraced within the other designations. These distinctions, however, are not carefully observed in military pleadings, where indeed the same act is not unfrequently found described by two or more of these terms, expressed disjunctively, in a charge under this Article.

Extent of liability to prosecution under the Article.—The concluding provision of the Article, by which the jurisdiction of courts-martial over offenders is continued until after their separation, by discharge or dismissal, from the military service, is of doubtful constitutionality, in that it subjects *civilians* to military arrest, trial and punishment. The Article, which is a part of an Act of Congress of March, 1863, was probably, as a whole or at least as to this provision, enacted with a special

view to the then existing war. The liability in question has been since rarely attempted to be enforced.

XV. THE SIXTY-FIRST ARTICLE.

[Conduct unbecoming an officer and a gentleman.]

ART. 61. *Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*

Construction of the Article.—In order to determine what is “conduct unbecoming an officer and a gentleman,” it will be desirable first to define the two terms “unbecoming” and “gentleman.” The term *unbecoming*, as here employed, is to be understood as meaning not merely inappropriate or unsuitable, as being opposed to good taste or propriety, or not consonant with usage, but morally unbefitting and unworthy. The term *gentleman* is used, not simply to designate a person of education, refinement and good breeding, but to indicate such a gentleman as an officer of the army is expected to be, viz., a man of honor; that is to say, a man of a high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment.

The misconduct contemplated.—These terms being settled, it is next to be observed that the conduct had in view by the Article may not consist in conduct unbecoming an *officer* only, or in conduct unbecoming a *gentleman* only, but must in every case be unbecoming the accused in *both* these characters at once. The act charged must thus have a double significance and effect. It must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to

bring dishonor or disrepute upon the military profession which he represents.

It is to be observed that while the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party (as a member of civil society or as a man of business), which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority, as to have seriously compromised his character and position as an officer of the Army and brought scandal or reproach upon the service.* But a charge founded upon a purely private transaction of an officer of the army is not favored in military law, and unless clearly of the above character should not be entertained.

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of *dismissal*. The Article in the fewest words declares that a member of the Army who misconducts himself as described is unworthy to abide in the military service of the United States. The fitness therefore of the accused to hold a commission in the Army, as discovered by the nature of the behavior complained of, or rather his worthiness, morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article.

General definition.—"Conduct unbecoming an officer and a gentleman" may thus be defined to be: Action

* See *Smith v. Whitney*, 116 U. S., 185.

or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; *Or* action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms.

Instances of offences charged under the Article.—The definition above given is best illustrated by a reference to some of the principal offences which, in practice, as indicated by the cases published in General Orders, have been charged and prosecuted under this Article. These are as follows:—Making a false official report or statement to a superior officer; Making false official statements or representations to an inferior officer; Calumniating or defaming another officer, or behaving toward him in a grossly insulting manner; Writing or publishing false or libellous matter in regard to another officer; Knowingly preferring false charges or accusations; Giving false testimony as a witness before a court-martial or board; Attempting to suborn testimony to be given before a court-martial; Breach of trust, official, semi-official, or personal, or other fraudulent or corrupt conduct; Dishonorable neglect to discharge pecuniary obligations; Duplication of pay accounts; Drunkenness of a gross character in public, or in the presence of military inferiors; Drunkenness or indulgence in intoxicating liquor after a formal pledge on honor given to a commanding officer to abstain therefrom; Cruel punishment, or other violent and oppressive treatment, of soldiers; Demeaning of himself with military inferiors; Offending against good morals, in violation of the local law, or of public decency or propriety.

XVI. THE SIXTY-SECOND ARTICLE.

[Conduct to the prejudice of good order and military discipline.]

ART. 62. *All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officer's court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.*

General purpose and use.—The evident purpose of this Article, which, derived from the British military law, has formed part of our code since 1775, is to provide for the trial and punishment of any and all military offences not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the Army. In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this, the “general” Article of the code. Wherever the offence committed is one not certainly, or fully, designated or described in some other particular Article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of two or more Articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings.

The offences made punishable.—The Article makes cognizable by court-martial: 1st. *Civil crimes not capital*, i.e. not made punishable with death by the common law

or by a statute of the United States applicable to the case; 2d. *Neglects of duty*, including evasions of, and failures to fully or properly perform duty; 3d. *Disorders*, i.e. acts of insubordination, violence, immorality, or drunken conduct, or other serious irregularity, not punishable under any other Article—*Provided* the same (i.e. crimes as well as neglects and disorders) are such as to be prejudicial to good order and military discipline. The term “good order” refers mainly to the order of the service, though, in cases of some crimes or of disorders amounting to breaches of the peace, it may be deemed to include also the order of the civil community. If the crime, the neglect, or the disorder, however grave it may be, is not one prejudicial to good order and military discipline, it is not chargeable under this Article. By “to the prejudice of” is meant to the detriment or depreciation of; and the prejudice must be near and direct, not merely indirect or remote. It is less difficult to determine whether the act is prejudicial to military order and discipline in the case of a neglect or disorder than in the case of a crime. On the one hand, such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer; and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offences. Crimes against civilians, however, will not unfrequently

prejudice more or less directly the discipline of a command, and the question whether, in any case, such a crime may properly be brought to trial by court-martial as a military offence under this Article, or should be disposed of as cognizable only by a civil tribunal, is one which may in general best be left to the department (or other) commander to determine.

Instances of neglects and disorders charged under this Article.—Among the principal of these, as published in General Orders, may be cited the following illustrations: *In cases of officers.*—Absence without leave; Neglect to observe post orders; Insubordinate conduct not properly chargeable under Art. 20 or 21; Neglect to attend drills or other regular exercises; Failure to maintain discipline within the command; Failure to bring offending inferiors to punishment; Allowing illegal or irregular practices to grow up within a command; Abuses of authority over soldiers; Arbitrary treatment of camp-followers; Employment of soldiers for personal or other improper uses; Neglect of public animals in his charge; Inefficiency in service against Indians; Taking part in meetings convened for the purpose of expressing disapprobation of the orders or acts of superiors; Publications in newspapers, pamphlets, etc., of strictures upon the acts of superior or other officers; Interference with or disrespect toward a sentinel; Neglecting the sick by a surgeon; As a member of a court-martial, disclosing proceedings had in secret session; Contempt of court, where not punished summarily under Art. 86; Violations of special paragraphs of the Army Regulations—as of Par. 57, in failing to report address when on leave of absence; of Par. 762, in addressing application direct to the Secretary of War instead of through proper military channels; of Pars. 899 and 900, in arresting and confining in the guard-house a medical officer for a trivial offence; of

Par. 590, in gambling as a disbursing officer; of Par. 587, in being, as a quartermaster, interested with civilians in a sale to the United States of quartermaster stores; of Par. 1300, in transferring a pay account before the pay was due; also Violation of the recruiting regulations (Art. LXXI, A. R.) in making improper enlistments.

In cases of soldiers.—Special neglects or violations of duty on guard, as—Omission to challenge in time of war, Bringing whiskey into guard-house, Improperly relieving sentinels by non-commissioned officer of the guard, and Allowing a prisoner to escape either from guard-house or from special custody; Escape while in confinement under arrest or under sentence; Straggling on the march; Malingering; Careless or wanton discharge of fire-arms so as to endanger man or animal; Injurious use or treatment of a public animal; Failing to appear or appearing drunk before a court-martial, as an accused or a witness; Refusing to testify; Behaving contumaciously to the court; Giving false testimony; Falsely personating and acting as an officer; Misconduct on target practice; Gambling with privates or allowing gambling by them in quarters, by a non-commissioned officer; Assuming to be and acting as a non-commissioned officer, by a private; Failure by a hospital steward to put up prescriptions correctly; Any *attempt*, not consummated, to commit a military offence or crime cognizable by court-martial; Any insubordinate, drunken, or disorderly conduct, resistance to arrest, violence toward a non-commissioned officer or soldier, breach of standing orders, non-performance or evasion of duty, etc., committed in camp, garrison, etc., and not specifically made punishable in some other Article of War; And, now, *fraudulent enlistment*, as provided in the Act of July 27, 1892.

Also all acts (not classed as "crimes," or made punishable in previous Articles), such as in a case of an *officer* would be within the description of Art. 61; as for example—Falsifying morning report-book, company clothing-book, muster-rolls, etc., by a non-commissioned officer or company clerk; Forging the name of an officer to a pass or furlough, order on the trader, ration return, etc.; Embezzlement of private property, or other misappropriation or fraud not included in Art. 60; Making false statements to a superior; Borrowing money of another soldier and not returning the same for an unreasonable time; Improper conduct to a laundress or other female employee or camp-follower.

XVII. CONCLUDING PROVISION OF THE CODE—SEC.
1343, R. S. [Trial and Punishment of Spies.]

All persons who in time of war or of rebellion against the supreme authority of the United States shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall on conviction thereof suffer death.

Definition of spy—Nature and proof of the offence.—A spy is a person who, without authority and secretly, collects or attempts to collect material information within the lines of one of the hostile armies, with the design of imparting it to the other. The information is commonly such as relates to the numbers or resources of the enemy, the state of his defences, the positions of his forces, their proposed movements or operations and the like. It is not necessary that the person should succeed in communicating or even obtaining the desired information or any information, provided he

"lurks" or stealthily "acts" with intent to obtain it. It is the clandestine and treacherous character of his proceeding which constitutes the gist of the offence of the spy. The concealment is in general contrived by his disguising himself by a change of dress, by coloring the hair, removing the beard or wearing a false one, assuming a false name, etc.; as also by false representations, by personating another individual, or by any other false pretence or form of deception. During the recent war the majority of the persons tried and convicted as spies were officers or soldiers of the enemy's army, who in penetrating our lines had abandoned their proper uniform for the dress of a civilian; and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated not as a prisoner of war, but as being *prima facie* a spy. This presumption, however, might, it was ruled, be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or having been detained within the lines by being separated from his regiment, etc., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case indeed the clearest proof would properly be required before accepting the defence.

Besides the lurking within the hostile lines, being in disguise, making false representations, etc., a most significant circumstance going to fix upon the suspected person the *animus* of the spy, is the destruction or attempted destruction by him, upon being detected, of letters, dispatches, or other writings in his possession containing information for the enemy. Another suspicious circumstance is an attempt to *bribe* the arresting party to allow him to proceed. This was a feature in the case of André, who also bore important papers concealed on his person.

While the spy will in general have insinuated himself within the lines of his enemy without the knowledge or authority of the latter, it is not essential that his original entering of the lines should have been unauthorized. Thus he may be a citizen or even a soldier of the nation or people against whom he offends, and so at the time of his offence legally within their territory. So, one who being legally admitted under a *flag of truce*, abuses his privilege by secretly collecting facts for the use of the enemy, renders himself liable to the punishment of the spy. Such was the situation in the case of André, who, moreover, held a *passport* from Arnold. But this could afford him no protection, since, having been furnished him by one who was in criminal complicity with him, it was null and void as a safe-conduct.

Mere observation of the enemy not this offence.—It need scarcely be added that the mere observing of the enemy with a view to gain intelligence of his movements does not constitute the offence in question, for this may be done, and in active service is constantly done, as a legitimate act of war. As remarked in the English "Manual of Military Law," "An officer in uniform, however nearly he approaches to the enemy, or however closely he observes his motions, is not a spy, and if taken must be treated as a prisoner of war." Observing the enemy from a *balloon* is no more criminal than any other form of reconnoissance.

Offenders who are not spies.—The nature of the crime of the spy may be further illustrated by indicating certain classes who, though guilty of a violation of the laws of war, are not chargeable as spies. Thus one who passes the lines without authority as a mere *letter carrier* is not a spy; nor is one who merely violates the rule of non-intercourse by trading with the enemy, or who simply gives intelligence to the enemy in violation

of Art. 46. And so one who comes secretly within the lines with a view to the destruction of property, killing of persons, robbery, and the like, is not *as such* a spy. Further, a person who passes through the lines as a *bearer of dispatches* from one post or force of the enemy to another is *as such* not to be treated as a spy but to be held as a prisoner of war.

Jurisdiction of the offence—Special principles.—A spy, if tried at all, can be tried only by a military tribunal. Thus our statute declares that his offence "*shall be triable by a general court-martial, or by a military commission.*" This jurisdiction, however, does not preclude military commanders from proceeding *summarily* against spies, by having them shot without trial if the facts of the offence and the circumstances of the emergency are such as to warrant it.

A military court, in passing upon a case of an alleged spy, is to be governed not only by the ordinary rules of evidence but by the principles established by the usages of war as recognized in the law of nations. Of the latter there are two jurisdictional principles peculiarly applicable to cases of spies, to wit: 1. A spy, to be triable and punishable as such, must be taken *in flagrante delicto*, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequently to such return, he is taken prisoner in battle or otherwise captured, he is not liable to trial or punishment for the original offence. 2. Further, a spy, to be punished as such, must be brought to trial and convicted during the existence, *i.e.*, before the end of, the war. But, as will be noticed in Part II, this principle is not peculiar to the case of the spy alone, but applies to other cases

of persons offending in time of war against the laws of war.

Punishment.—By the law of nations the crime of the spy is punishable with death, and by our statute this penalty is made mandatory upon conviction. Such penalty—the law not specifying the form—may be executed either by shooting or hanging. The sentence “to be shot” was in a few instances imposed during the late war; but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe, was adjudged. The extreme penalty is not assigned to this offence because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders; and the spy himself, where he volunteers (for he cannot be ordered) to act from a patriotic motive or courageous spirit, and not merely in view of a special reward, is worthy of high honor as one who exposes himself to imminent danger for the public good. The offence of spies is punished with death, because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel observes, “*puisque l’on n’ a guères d’autre moyen de se garantir du mal qu’ils peuvent faire.*”

OTHER ARTICLES OF WAR.

Of the other Articles comprised in our Code, the following (with their subjects) are the most important: Arts. 2 and 3 (Enlistment of soldiers); Art. 4 (Discharge of soldiers); Art. 8 (False returns by commanding officers); Art. 9 (Disposition of public stores taken from enemies); Arts. 15, 16 and 17 (Liability of officers and soldiers for loss, etc., of military stores and other public property); Art. 19 (Using

disrespectful language toward the President, Congress, etc.); Art. 41 (Occasioning false alarms in camp, etc., by an officer); Art. 44 (Unauthorized communication of watchword, etc.); Art. 99 (Prohibition of dismissal of officers *in time of peace*, by executive order, or otherwise than in pursuance of sentence of court-martial); Art. 122 (Priority of right of command, when different detachments, etc., meet in service); Art. 123 (Assimilation of volunteer officers, serving in the Army, to regular officers, as to rank, duties and rights); Art. 124 (Inferiority of relative rank of militia officers, when serving in connection with regular or volunteer officers of the same grade); Arts. 125, 126 and 127 (Care and disposition of effects of deceased officers and soldiers).

These Articles, with all others not herein considered, will be found discussed in the main work of which this is an abridgment.

PART II.

THE LAW OF WAR.

The subject defined and divided.—Except as declared in a few of the Articles of War relating to offences committed in time of war, and as recognized in a few legislative provisions, the Law of War, as exercised in this country, is not an enacted code, but consists mainly of certain usages and principles derived from the law of nations, supplemented by regulations and orders of the military power. Finding its original authority in the war powers of Congress and of the Executive, and thus constitutional in its source, the law of war may, in its exercise, substantially supersede for the time the Constitution and laws of the land. But with the termination of the war or like exigency this law also ceases to be operative, and the municipal law resumes its sway.

Without entering upon discussions of questions which pertain to works on International Law, the present subject will be here considered principally with reference to the exercise of *military authority and jurisdiction* under the laws of war, as illustrated by the practice of our wars and especially that of the late civil war.

The subject will be divided as follows:

I. The law of war as affecting the rights of our own people.

II. The law of war as affecting intercourse between enemies in general.

III. The law of war as specially applicable to enemies in arms.

IV. The status of Military Government, and the laws of war thereto pertaining.

V. The status of Martial Law, and the laws of war applicable thereto.

VI. Trial and punishment of offences under the law of war—the Military Commission.

I. The law of war as affecting the rights of our own people—*Taking or destruction of private property.*—Whether and to what extent our armies, in the course of their military operations in time of war, may take or destroy the private property of our own people (*i.e.* of persons not enemies or hostile), is a question of *necessity*. Where there exists an urgent necessity or an immediate danger, the commander may be warranted in forcibly appropriating, for the use of his army, supplies, material, buildings, animals, vehicles, etc., required for its subsistence, shelter, transportation, etc., or for its defence against the enemy, or in seizing or destroying such or other property to prevent its falling into the hands of the enemy or being availed of by him for attack or defence. The circumstances, however, must be most urgent; the exigency immediate, not contingent or remote. Otherwise the taking or destruction is not a legitimate act of war, is not justified by the laws of war,* and the commander giving the order and those acting under him are *trespassers*, and it is they, and not the United States, who are liable in damages to the injured party. The leading case on this subject in our law is that of *Harmony v. Mitchell*,† in which judgment was given

* See Executive directions in G. O. 101 of 1898.

† 1 Blatchford, 549; 13 Howard, 115.

against Lieut. Col. D. D. Mitchell, of Col. Doniphan's command, on account of the appropriation, in 1847, during the war with Mexico, of horses, mules, wagons and goods belonging to the plaintiff, a trader and citizen of the United States, at a time when such property, though important for facilitating the operations of the army, was not necessary for its use, and was not in danger of falling into the hands of the enemy then more than two hundred miles distant and not advancing. The rule here laid down has been observed in repeated subsequent adjudications, especially in suits arising out of the late war. In some of these cases damages were awarded against the officers exercising the authority, but in the majority the taking, etc., was held warranted by the circumstances of the exigency.

As to the liability of the *Government* in such cases, the authorities distinguish between instances of private property *destroyed* in the legitimate prosecution of the war, and instances of such property *taken* as supplies for the use of the army and used by it; recognizing generally such a liability in the latter but not in the former class of cases.

Arrest or constraint of persons.—This subject, so far as affected by the laws of war, belongs properly to the special titles of Military Government or Martial Law, yet to be considered.

II. The law of war as affecting intercourse between enemies in general—*Rule of non-intercourse.*—The principle here to be noticed is simply that of the absolute non-intercourse of enemies in war. As frequently reiterated in the rulings of the U. S. Supreme Court, not merely the military forces, but all the inhabitants of the one belligerent nation or district, become, upon the initiation of a foreign or civil

war, the enemies, legally, of those of the other, and all intercourse between them is terminated and interdicted. In special cases—by the authority, in our wars, of legislation of Congress, or perhaps, in the absence of legislation, of a license from the President as Commander-in-chief—certain trade or communication may be permitted, but such permits are exceptions and are to be strictly construed. The *rule* is that, pending the war, all domestic, social, and business relations are forcibly severed; all interchange, however personal and intrinsically harmless, is forbidden; no new contracts or engagements can be entered into; existing partnerships and joint undertakings are dissolved, and existing pecuniary obligations are suspended.

Enforcement and violation of the rule.—The drawing of strict army lines, the patrolling, with troops or armed vessels, of the territory, rivers, etc., intervening between the belligerents, and the establishment of military posts upon main routes of travel, and of blockades of important ports, while measures defensive and offensive as against the hostile forces, are also efficient means for the enforcement of this rule of non-intercourse. Infractions of this rule, by selling to, buying from, or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, etc., are *violations of the laws of war*, more or less grave in proportion as they render material aid or information to the enemy or attempt to do so, and, as will hereafter be illustrated, are among the most frequent of the offences tried and punished by *military commission*.

III. The law of war as specially applicable to enemies in arms—*Rights and obligations of warfare in general.*—While the laws and usages of civilized warfare, which constitute the main code of

restraint and government as between opposing armies, authorize the killing or disabling of members of the one army by those of the other, in battle or hostile operations, by the ordinary and approved weapons; the capture and holding or paroling of individuals of the enemy's forces as prisoners of war; the practising of stratagems and deceptions which do not involve treachery or perfidy; the seizure of enemy's property in general; and the destruction of such property when necessary for the due prosecution of hostilities—the same laws and usages also impose obligations correlative to these rights or incident to their exercise, a violation or disregard of which may constitute a capital or otherwise grave offence.

Illegal warfare—Killing, etc., of non-combatants.—It is forbidden by the usages of civilized nations to take the lives of, or commit violence against, non-combatants and private individuals not in arms, including women and children and the sick. Such classes, so long as peaceably conducting themselves, are entitled to protection, and soldiers or others who may violate their rights of person or property are guilty of a most serious offence against the laws of war. A similar rule of protection applies to persons voluntarily surrendering themselves as prisoners.

Right of capture of property.—By the strict law of war, the army of one belligerent may seize and appropriate not only the public property of the other belligerent, but also the private property of individual enemies. This right, however, has been qualified in its exercise by the modern law of nations, and private property is in general regarded as properly exempt from seizure except where appropriate for military use or of a hostile character. Thus the species of private property which was mainly the subject of capture in the late civil war was *cotton*, which, constituting as it did the main resource of the enemy for the prosecution of the war, was held to

be clearly *hostile property*—"as much so as the military supplies and munitions of war it was used to obtain."

But all the captures recognized as legitimate in our law and practice have been captures for and by the authority of the United States. No taking for private use or gain has been allowed, but such taking has been regarded as a grave military offence in violation of the 42d or other Article of War. The spoil or booty sometimes permitted to European armies, of property seized on the battle-field or at the storming of a fortified place, would not be recognized as legal in our law.

The subject of the exacting of money or other private property of enemies, by way of *contribution* to the support of the government or army, or of *indemnity* to individuals, will be more appropriately considered under the Title of Military Government.

Destruction of property of the enemy.—This may always be resorted to by a commander where rendered necessary or desirable for the successful prosecution of legitimate hostile operations, but not in general otherwise. The usages of civilized nations not only exempt public institutions of a civil character such as State houses, court houses, churches, asylums, colleges, museums, and the like from the operations of war, but forbid *any* wanton or malicious destruction of property, public or private. The burning of isolated private dwellings or buildings may, in exceptional cases, be excused by an emergency of war; but the firing of a town or village, unless accidentally caused by its being involved in an engagement, etc., is an act of inexcusable vandalism and a grave crime in violation of the laws of war. Such, for example, has been declared to be the burning of a portion of Washington, including the Capitol and President's House, by the British forces in 1814.

Guerilla warfare.—The unlawful taking of life or

property in our wars has, in the majority of cases, been the act of armed enemies, not commissioned, enlisted, or duly employed in the military service of the enemy, but acting independently—singly or in bands—and usually within districts of the enemy's country, occupied or invaded by our armies, or in contiguous portions of our own territory. Such parties, in the killing, wounding, robbery, etc., of peaceable citizens or of soldiers, or the seizure, burning, or otherwise destroying of private property, or of munitions of war, means of transportation, etc., of our Army, are, whether actuated by hostility, revenge, or a desire of personal profit, in general to be regarded as criminals and outlaws, not within the protection of the rights of war, or entitled, upon capture, to be treated as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt is clear or upon trial and conviction by military commission. Numerous instances of trials, for "violation of the laws of war," of offenders of this description, termed *guerilleros* in the war with Mexico, and "guerillamarauders" in Art. 105, but principally known during the late civil war as *guerillas*, are contained in the General Orders especially of the latter period.

Use of illegitimate weapons or means.—An illegitimate weapon of war would be one which, in disabling or causing death, inflicted an exceptional and wholly unnecessary amount of suffering or injury, and the deliberate use of such a weapon would properly be treated as a violation of the laws of war. Thus the use of copper balls, and of explosive bullets, has, at different times, been condemned in our wars as wanton and illegitimate. So the employment of an insidious means which cannot be guarded against, as *poison* in the infecting of wells, food, etc., is universally denounced by the authorities as wholly interdicted by the usages of civilized belligerents.

Stratagem and deception.—Though it is permitted to surprise and prevail over the enemy by feints, pretended retreats or other movements, false signals, fictitious despatches allowed to be discovered or intercepted, and the like, a resort to secret and treacherous means, which cannot be guarded against by ordinary vigilance, is not permitted by the law of war. Thus it is held not to be a lawful *ruse de guerre* to deceive an enemy by being disguised in the uniform of his army; and soldiers captured, when so disguised, within the lines of the opposing forces, are not entitled to quarter but may be shot without trial, or, if tried, be sentenced to death in the same manner as spies. The offence of the spy, heretofore considered, is itself a marked instance of a prohibited act of this class.

Secretly entering the lines.—Similar to, though less grave than the violation of the laws of war committed by the *spy*, is that committed by officers, soldiers, or agents of an enemy in coming secretly within the lines of, or into country occupied and held by, a hostile force for any unauthorized purpose, as, for example, for the purpose of recruiting for their army, obtaining horses or supplies for the same, holding unlawful communication, etc.,—a class of offences of which instances were not unfrequent in the border States during the late war.

Abuse of a flag of truce.—A bearer of a flag of truce who employs the same for an illegitimate purpose, as for the purpose of observing the enemy's position, numbers, etc.; or who, having been halted with his flag outside the lines, obtains access within them by making false representations; or, when admitted within the lines, abuses his privilege by false statements, secret communications, taking notes, etc., is liable to be arrested and tried under the laws of war, or, in a clear case, to be shot without trial.

Violation of a truce.—This offence may consist in an act in contravention of the terms of the truce as agreed upon, or in an act wholly inconsistent with the truce status. Thus in the Mexican war (1847), a violation of the laws of war was, as claimed by General Scott, committed by Gen. Santa Anna, in his strengthening the defences of the city of Mexico, during an armistice and in disregard of one of its expressed conditions.

A gross instance of a breach of the laws of war would be the taking advantage of a temporary truce between the armies to seize or kill individuals of the enemy or surprise his forces by an attack. Of this class was the offence of the Modoc Indians, who during a truce and conference between their tribe and our army in the course of hostilities in northern California, in April, 1873, took the lives of Brig. Gen. Canby and Rev. E. Thomas, a "peace commissioner." Of this crime Atty. Gen. Williams observes: "All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our Western frontiers, but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act." *

Improper treatment of prisoners of war.—The laws and usages of modern warfare require that prisoners of war shall be treated by the captor with humanity, shall be allowed to retain or be furnished with necessary and proper clothing, and shall receive the necessary subsistence, protection from the elements and care in illness. If a belligerent is without the means of subsisting his prisoners, he should release them on parole, or allow

* 14 Opins. At. Gen., 249.

them to be subsisted by the other belligerent under a special arrangement. Prisoners of war are not subject to *punishment* as such, and harsh measures employed toward them can in general be justified only when essential to prevent escape or repress violence or insubordination. Where a captive entitled to be treated as a prisoner of war is put to death, or where cruel or unreasonably severe treatment of prisoners is practised or permitted by one belligerent, the other, so far as the usages of civilized warfare permit, may *retaliate*; and any individual officer resorting to or taking part in such act or treatment is guilty of a grave violation of the laws of war, for which, upon being himself captured, he may be brought to trial by military commission.

Violation of parole by prisoner of war.—A breach of his parole by a paroled prisoner of war is a violation of the laws of war rendering him liable to the punishment of death. The offence, which was a rare one during the late war, was so frequent during the war with Mexico that offenders were publicly threatened with hanging by General Scott, and the signing of the parole was required to be accompanied by the taking of a religious oath. The engagement of a parole is usually to the effect that the prisoner will not serve actively in the field during the pending war unless duly exchanged. He may in general, in the absence of specific stipulation to the contrary, legally perform "internal service such as recruiting or drilling recruits," garrisoning posts not on the theatre of war, and—as it is declared in a General Order issued during the last war with Great Britain—"guarding stores and provisions of war in the interior," and "paying the troops and making purchases on account of the United States." In the official *cartel*, however, agreed upon between the United States and the Confederate States during the late war,

it was, more strictly, prescribed that paroled prisoners should "not be permitted to take up arms again, nor to serve as a military police or constabulary force in any fort, garrison, or field work held by either of the respective parties, nor as guards of prisons, depots or stores, nor to discharge any duty usually performed by soldiers," or any "field duty,"—until exchanged. Under this cartel it was held by the Attorney General that the United States government would not be authorized to employ paroled prisoners in repelling an invasion or suppressing an outbreak of hostile Indians.

In the capitulation agreed upon between Gens. Grant and Lee, of April 9th, 1865, it was stipulated that each officer should give a parole under oath, for himself (and also for the men under his command, when a commanding officer), that he (and they) would not thereafter serve in the armies of the Confederate States or in any military capacity whatever against the United States of America, or render aid to the enemies of the latter, until exchanged; and that prisoners, on being paroled, should be at liberty to return to their homes.

IV. The status of Military Government, and the laws of war thereto pertaining—

Military government defined.—By "military government" is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof.* To this form of rule the name of "martial law" has sometimes been applied; but *military government* is distinguished from *martial law* (as the term is employed in this treatise), in that, while the former is usually exercised in war over the inhabitants of an enemy's country, the latter is exercised, in a public emergency (whether or not growing out of war), over our own fellow-citizens at

* It may also be exercised, after war, over a country late of the enemy for which Congress has not yet provided a civil government—as in the case of the Philippines.

home.* Military government is further distinguished from martial law in that, unlike the latter, it requires no formal proclamation or declaration for its inauguration, but exists simply as a consequence of conquest and occupation.

Its general effect.—Military government is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of municipal administration. The country must indeed be not merely occupied by the prevailing belligerent but firmly held, but when so held, his government, whether administered by officers of his army or by civilians appointed for the purpose, is the legal government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. The municipal laws and ordinances may be left in force, or they may be, in whole or in part, suspended and others substituted in their stead—in the discretion of the governing authority.† How such discretion shall be exercised will in general depend mainly upon the temper and conduct of the inhabitants and their officials, and upon the ability of the latter to preserve order and maintain justice. It may indeed happen that because of the incapacity of the local authorities to afford protection to the peaceable portion of the community, a strict military government may become a necessity.

By whom exercised.—The efficient prosecution of hostilities in war being devolved upon the President as Commander-in-chief, it will become his right and duty (unless Congress otherwise provide) to exercise military government over such portion of the country of the enemy as may pass into the possession of his army by the right of conquest. In such government the Presi-

* See *Ex parte Milligan*, 3 Wallace, 141.

† See Executive directions in G. O. 101 of 1898; also G. O. 8, Office of the Military Governor in the Philippine Islands, Oct. 7, 1898, as to the local civil courts.

dent represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction.

Magnitude of the power—Its limitation.—The power of military government thus vested in the President or his military subordinates is a large and extraordinary one, being subject only to such conditions and restrictions as the law of war may impose upon the scope of its exercise. As it is expressed by the Supreme Court —“There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. . . . *In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace.*” *

Features of its exercise—Appointment of executive and judicial officials.—While the conquering belligerent may, if he see fit, abstain from changing the machinery of the civil government of the enemy's country, he may, on the other hand, find it necessary or expedient to appoint for the same competent civilian or military persons as commissioners, governors, mayors, sheriffs, secretaries of state, collectors of customs, etc., who, upon his nomination and under his orders, will legally supersede the existing officials and so far administer the government. Thus, in 1847, pursuant to the orders of President Polk, a civil government, the legality of which was subsequently affirmed by the Supreme Court, was established by General Kearney, as commander of the

* New Orleans v. The Steamship Company, 20 Wallace, 394.

forces, in Upper California, then in the possession of our Army as a conquered Mexican province. This government consisted mainly of military officers appointed to act as civil officials, to wit: Col. R. B. Mason, 1st Dragoons, as Governor, 1st Lieut. H. W. Halleck, Engineer Corps, as Secretary of State, Capt. J. L. Folsom, A. Q. M., as Collector of Customs, etc. Col. Mason was succeeded by Bvt. Brig. Gen. B. Riley, who continued military governor till Dec. 20, 1849, the date of the ratification and adoption of the first constitution of California.

Similarly, in 1846, the same commander (Gen. Kearney) established a provisional government in New Mexico, a part of which was a "judicial system" consisting of a superior or appellate court, and circuit courts, whose jurisdiction was also specifically defined. This government also was held by the Supreme Court to have been a legally authorized institution, deposing and superseding, during the period of the occupation of the country as a conquered province, the pre-existing municipal government.

More recent instances of Military Government were the appointments by the President of military governors and provisional governors for the insurrectionary States in 1862 and 1865, of provisional and provost courts by the President and military commanders throughout the South during the war, and of civil officials by the District commanders during the Reconstruction period of 1867-1870. The U. S. Supreme Court has in several cases affirmed the legality of judgments for the recovery of debts of large amount, rendered in favor of individuals and corporations by courts established under military government.

Exaction of Contributions.—As a further feature of Military Government, the President, or commanding

officer representing him, is authorized by the laws and usages of war to exact pecuniary contributions from the inhabitants for the support of the government or army.* "Contributions" so called are generally exacted from persons in the mass—as from communities, towns, etc. Thus, upon the conquest of Mexico in 1847, General Scott levied assessments in various amounts on the nineteen States of that Republic "for the support of the American military occupation," of which was collected the sum of about \$220,000. Previously, in March of the same year, at Monterey, General Taylor had made and enforced an assessment upon the inhabitants of Tamaulipas, New Leon, and Coahuila, by way of indemnification for the pillage and destruction of his wagon trains. In two cases the Supreme Court has recognized as legal the imposition at Tampico and San Francisco in 1847 of duties on imports, as "a mode of exacting contributions from the enemy to support our Army," and therefore a legitimate war measure or "weapon of war." In the recent war, contributions were sometimes assessed for the benefit of the poor, for hospital and sanitary purposes, and to indemnify persons who had been subjected to unusual suffering from lawless warfare or other incidents of the pending hostilities.

Other features of Military Government.—The commander may, further, resort, in his discretion, to such measures as police regulations, quarantine regulations, regulations of travel and transit, regulation of elections, etc. He may also direct or modify, so far as expedient, the course of public education; and may assume the control of publications by suppressing or suspending newspapers by which hostility is excited against his Government or its measures in the prosecution of the war, or information or encouragement is conveyed to the enemy. In an exigency, he may impress citizens

* See Executive directions in G. O. 101 of 1898.

into the military service, or compel them to perform labor for the common defence or other public purpose. He may restrain by confinement, and in extreme cases summarily punish, persons guilty of violations of the laws of war, hostile demonstrations, or public disorders. In the great majority, however, of such cases he will cause the offenders to be brought to trial by *military commission*.

V. The status of Martial Law, and the laws of war applicable thereto—*Martial law defined.*—The term “martial law” has been loosely employed as a general designation for any kind of military control. It has been, and sometimes still is, confounded with *military law proper* or the code of the soldier; and, as heretofore remarked, has been used as the name or description of the *military government* already defined as the dominion exercised over the inhabitants of an enemy’s country upon its conquest and occupation. Properly, however (or as interpreted in this work), *martial law* is defined as military rule exercised by the United States (or a State) over its own citizens (not being enemies) in an emergency justifying it. It thus differs from “military government” in the field of its exercise and the class of persons to which it is applied. The *occasion* for martial law will more commonly arise during a state of war. It may, however, be resorted to at a time of insurrection, rebellion, riot, or other emergency, when there is present or imminent a public danger which ordinary means are incompetent to avert, and a due consideration for the public safety demands its exercise.

How inaugurated.—Martial law, involving as it may a considerable restriction of the rights and privileges of a citizen, is properly and customarily inaugurated by

a formal *proclamation* of the President as Commander-in-chief, or *declaration* of the commanding general. This notification designates the place or district within which military authority is to be operative; setting forth also in some cases the reason or occasion for the action taken, how far and in what manner it shall affect the courts or civil administration or the business or habits of the community, and what regulations shall be observed during its continuance.

Limitations of Martial Law.—The employment of Martial Law has been likened to the exercise of the right of *self-defence* by an individual. Its occasion and justification thus is *necessity*. But though in general without other limit than the discretion of the commander upon whom its execution is devolved, it is not an absolute power, but one to be exercised with such strictness only as circumstances may require. The often quoted remark that martial law is simply "the will of the general who commands the army" is a description much less apposite in practice to martial law proper, or *domestic* martial law, than to that *military government of enemies* heretofore considered, and with reference to which in fact the observation was originally employed by Wellington. Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions; but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen. It may, like "military government," call upon him to perform special service or labor for the public defence,

but otherwise usually leaves him to his ordinary avocations.

It is a principle of the exercise of martial law that even when required to be executed with exceptional stringency and for a protracted period, it shall not be permitted to serve as a pretext for *license* or *disorder* on the part of the military; and acts of undue violence and oppression committed in its name will by the laws of war be visited with extreme punishment.

It is a further principle that, while martial law is not to be inaugurated precipitately or inconsiderately, so it is to be *continued* only so long as the public exigency on account of which it was declared shall prevail. It is not indeed essential to the discontinuance of such status that the original declaration of the same be formally *revoked*. When the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced.

Instances of its exercise.—The principal instances of Martial Law as exercised in our history are the following:—The martial law proclaimed by Maj. Gen. Jackson at New Orleans on December 16, 1814, when the English forces under Maj. Gen. Pakenham were threatening the city; That declared by Maj. Gen. Scott, in Mexico, in his G. O. 20 of 1847, by which was also initiated the “military commission;” That announced early in the civil war by the general proclamation of the President of September 24, 1862; That established in and for the separate State of Kentucky by the proclamation of the President of July 5, 1864; That declared by Maj. Gen. Fremont in the city and county of St. Louis, Mo., by order of August 14, 1861, repeated and extended by order of Maj. Gen. Halleck of December 26, 1861; That established within the Department of the South by Maj.

Gen. Hunter, by a G. O. of April, 1862; That declared by Maj. Gen. Butler, upon the occupation of New Orleans, May 1, 1862; That declared in Baltimore and the western counties of Maryland by proclamation of Maj. Gen. Schenck, of June 30, 1863, at the time of the invasion of Maryland and Pennsylvania by the army under Lee; That declared in Cincinnati, Ohio, and the cities of Covington and Newport, Ky., by the Dept. commander, by G. O. 114 of 1863, in view of the threatened advance of the forces under Morgan; That declared within the State of Kansas, by a Dept. G. O. (No. 54) of 1864, in anticipation of an invasion by the army under Price; That declared by the Dept. commander at New Orleans, July 30, 1866, on the occasion of an aggravated riot. Of these declarations, that of Gen. Scott in Mexico was, *in law*, quite unnecessary, the country being at the time under *military government*; and the same may be said of the declarations made by commanders of districts under military government during the late war.

Exercise of Martial Law as connected with the suspension of the privilege of the writ of Habeas Corpus.—The legitimate effect of a declaration of Martial Law is to suspend for the time the privilege of this writ. But it now seems to be settled by the weight of authority that the President (and of course a military commander) is not empowered under the Constitution, in connection with a proclamation of martial law or otherwise, to suspend the writ, *unless* such suspension has been first specifically authorized by Congress. As the suspension is essential to the effective making of summary arrests by military force, and as martial law cannot be fully exerted in the absence of power to make and effectuate such arrests, it follows that martial law will in the future rarely be initiated in the United States, by the authority of the Executive, where Congress, by not empowering

the President to suspend the privilege of the writ, has omitted to provide the means for rendering the exercise of such law effectual. But, in the event of a resort to the same in an adequate emergency, and of the consequent arrest and temporary holding by military authority, in good faith and what is believed to be the full and proper performance of duty, of hostile or otherwise dangerous persons, after judicial process has been issued for their release, it can scarcely be questioned that Congress, if it does not expressly ratify the act, will at least protect or indemnify the officers and soldiers concerned by suitable legislation.

VI. Trial and punishment of offences under the law of war by the Military Commission—*Authority and occasion for this tribunal.*—The *authority* for the Military Commission is the same as the authority for the making and prosecution of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the laws of war. While international law, in a case of violation of its rules, proceeds commonly against the thing,—*in rem*,—the law of war judges and punishes the offender; and this mostly through the military commission.

The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.

History of the Military Commission.—This "commission" was initiated by General Scott in Mexico, in 1847,

mainly for the punishment of murder, robbery, and other violent crimes, committed either by civilians or military persons, and not then cognizable by court-martial. At the same time he inaugurated a separate tribunal, designated as the "council of war," for the punishment of offences peculiar to war, and especially crimes committed by members of guerilla bands. Early in the recent war these two jurisdictions were, by the practice of commanders sanctioned by the War Department, united in one war-court for which the designation of *military commission* was retained as the preferable one. In the course of the war this court was recognized as a legal institution in a succession of enactments of Congress, some of which extended its jurisdiction and provided for the revision of its proceedings and execution of its sentences. A majority of these statutes are still in force, though applicable of course only to time of war. The military commission has also been recognized as an authorized provisional tribunal in proclamations and orders of the President and in rulings and opinions of the courts and law officers of the government. The Supreme Court of the United States has acknowledged the validity of its judgments in leading cases, and other courts of the United States and of the States have equally accepted it as a legal body. In an important adjudication the Supreme Court of Tennessee refers to it as "a tribunal now (1870) as well known and recognized in the laws of the United States as a court-martial." * Thus sanctioned, military commissions, pending the civil war, and down to the termination of the operation of the Reconstruction Laws, must have tried and given judgment in upwards of two thousand cases, promulgated in G. O. of the War Department and

* *State v. Stillman*, 7 Cold., 352.

of the various military departments and armies. The last military commission was that convened for the trial, in 1873, of six Modoc Indians for a violation of the laws of war already referred to.

Constitution and Composition of Military Commissions.—In the absence of any statute prescribing by whom military commissions shall be constituted, or how they shall be composed, they have been in practice constituted by the same commanders as are empowered to order general courts-martial, although legally other commanders would be empowered to convene them. They have commonly been composed of five members, though three has been a not unusual number: any lesser or other number, however, would be legal.

Jurisdiction of Military Commissions.—1. As to *place and time*: A military commission has jurisdiction only of offences committed either on the theatre of war or in a place under military government or martial law, and committed *during* the war or the period of the exercise of such government or law. 2. As to *persons*: The classes who may become subject to this jurisdiction are the following—(a) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (b) Inhabitants of enemy's country occupied and held by the right of conquest; (c) Inhabitants of places or districts under martial law; (d) Officers or soldiers of our Army, or persons serving with it in the field, who in time of war became chargeable with crimes or offences not cognizable under the Articles of War. 3. As to *offences*: The offences within the jurisdiction may be classed as follows—(a) Violations of the laws and usages of war; (b) Crimes and offences cognizable by the local courts but which cannot be tried by such courts because not open or in operation; (c) Breaches of military orders or reg-

ulations, committed by persons not triable by courts-martial under the Articles of War.

As already indicated military commissions cannot take cognizance of the purely military offences specified in the Articles of War and made punishable by sentence of court-martial; nor, being criminal courts, have they jurisdiction of private controversies between individuals.

Procedure.—In the absence of any statute or regulation concerning the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts, however, are more summary in their action than are the courts held under the Articles of War, and as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial, such, for example, as the administering of a specific oath to the members, or the affording the accused an opportunity of challenge. In practice, however, their procedure is nearly identical with that of courts-martial, and upon the hearing as well as in the judgment they substantially observe the established rules and principles of law and evidence.

A military commission under the laws of war must be convened and must act during the period of the operation of those laws. Such a commission cannot legally try an offender for a violation of the laws of war *after* the war or like exigency has terminated and peace or a normal status has been restored.

Power of Punishment.—Except in the case of spies, the existing law makes no provision whatever in regard to the quality or quantity of the punishment to be adjudged by the military commission. The power of such a court to award sentence is thus practically without

restriction. It is not limited to the penalties known to the practice of courts-martial, nor indeed are the strictly military penalties, such as dismissal, dishonorable discharge, suspension, etc., in general appropriate to it. The punishments more usually employed have been death, imprisonment and fine. Fines of considerable magnitude were not unfrequently adjudged by these courts during the late war; the largest being amounts of \$90,000 and \$250,000, imposed respectively upon two agents of the Treasury Department on conviction of a charge of conspiring to defraud the United States out of the value of captured cotton. More peculiar forms of penalty awarded by the same tribunals at that period were—confiscation of property, forfeiture of licenses to trade, expulsion beyond the limits of the command or of the Army, the furnishing of a bond with security for future good behavior, and the taking of an oath of allegiance. Bonds, oaths, or bond and oath, were also occasionally required by *reviewing officers* in remitting sentence. By the same authority it was sometimes ordered that the accused on being released be sent beyond the lines or to some particular locality. In some cases remission of a punishment of imprisonment was granted on condition of the payment by the accused of a certain sum of money, or of his enlisting in our military service.

Appeal.—As in the case of a judgment of court-martial, the proceedings or sentences of military commissions are not—as held by the U. S. Supreme Court, in *Ex parte Vallandigham* *—subject to be appealed from to, or to be reversed by, any civil tribunal.

* 1 Wallace, 248.

PART III.

CIVIL FUNCTIONS AND RELATIONS OF THE
MILITARY.

THIS Part will be presented under the following Titles:

- I. Employment of the military in a civil or *quasi* civil capacity.
- II. Liability of the military to civil suit or prosecution.
- III. Other civil relations of the military.

I. Employment of the military in a civil or quasi civil capacity.—The Army is subject to be employed in such a capacity for the following purposes:

1. *For the protection of a State "against domestic violence,"* under Sec. 4, Art. IV, of the Constitution, and the statutes expressly authorizing a resort to the *military* for the purpose. Where the services of the Army are thus required, a sufficient military force is ordered by the President to the disturbed locality with the proper instructions for the repression of the existing violence. This force acts, not under the Governor or other State official or commander, but under the command and direction of the President and its own

officers. Inasmuch, however, as its purpose is to aid in the execution of the laws and the restoration of the peace of the State, its action should in general, as far as practicable, be in concert with the action or views of the State authorities. Further, while it should of course move and operate with promptitude and efficiency, no more military power than is reasonably required should be resorted to, nor the disorderly element be treated like an enemy in war unless the emergency is such as to demand extreme measures: often a demonstration in force will be sufficient without a resort to arms.

2. *For the suppression of insurrection, etc.*, as expressly authorized by Secs. 5298 and 5299, Rev. Sts.—Under these Sections, the assistance of the military may be resorted to in any instance of insurrection or lawless combination, from an isolated case of riotous obstruction, to a rebellion of the magnitude of the recent civil war. In the instance of a rebellion of this character the Army would assume a purely military and hostile attitude as against an enemy; but in cases of lesser disorders it would be employed more in a *quasi* civil capacity, as a force to keep the public peace, and similarly as when used to suppress “domestic violence” under the provision of the Constitution above considered; its operations being conducted exclusively under the orders and directions of the President and its immediate commanders.*

3. *As a Posse Comitatus, etc.*—Until a recent period the military could legally be called upon by a U. S. marshal or deputy marshal to serve as a *posse comitatus* whenever their assistance was necessary for the execution of the process of the U. S. courts. But by an Act of Congress of June 18, 1878, it was declared to be no longer lawful to employ any part of the Army “as a *posse comitatus*, or otherwise, for the purpose of exe-

* See the “Instructions” published in G. O. 15 and 23 of 1894, issued in view of the “Strike” of that year.

cuting the laws," except when "*expressly authorized*" by the Constitution or public statute. This legislation restricts the present authority to employ the military for civil service to a comparatively small number of cases; the principal being those provided for by the Constitutional injunction and statutory enactments designated under the above two heads; and those specified in the following Sections of the Revised Statutes—*viz.*: Secs. 1984 and 1989, authorizing the President to employ the land forces for the execution of the laws enacted for the protection of civil rights; Sec. 2002, authorizing the use of the military to keep the peace at elections; Sec. 2062, authorizing the President to assign army officers as Indian agents; Secs. 2118, 2147, 2150, 2151 and 2152, authorizing the President to employ the military for the removal of intruders from the Indian country, for preventing the introduction therein of unauthorized persons and things, and for suppressing hostilities between Indian tribes, etc.; Sec. 2190, authorizing the Secretary of War to direct officers of the Army to aid in taking the census; Sec. 4792, requiring military officers commanding on the coast to aid in the execution of the quarantine laws; Sec. 5275, authorizing the President to employ a military force for the custody of extradited persons; Secs. 5287 and 5288, authorizing the President to avail himself of the Army in executing the neutrality laws. In all such excepted cases the military may still be employed for the execution of the particular law, notwithstanding the general prohibition of 1878.

Attitude of the military toward the civil community when not authorized to be employed as above specified.—Except as and when employed and ordered under the statutes and authority heretofore indicated, the U. S. military are not empowered to intervene or act *as such* on any occasion of violation of local law or civil disorder.

or in the arrest of civil criminals. While officers or soldiers of the Army may individually, in their capacity of *citizens*, use force to prevent a breach of the peace or the commission of a crime in their presence, they cannot (except as above) legally take part, in their military capacity, in the administration of civil justice or law. Their attitude, therefore, as military, toward the civil community and the civil authorities, at a period of riot or lawless disturbance, should in general be a strictly neutral one: whatever the temptation or occasion, they should remain simply passive until required by the President, through their immediate commanders, to act.

4. *For the removal of trespassers from Military Reservations.*—The enactment of 1878 above cited restricted the employment of the military “*for the purpose of executing the laws*,” but not otherwise. It did not, therefore, affect the general authority of the President *as Commander-in-chief* to use the Army for the removal of trespassers and intruders from the military reservations or posts under his command; this not being properly an execution of a law but a form of protecting the public property in his charge and exercising an ordinary and reasonable police power over the same. Such authority extends to the expulsion of squatters or other persons entering upon and occupying the land whether or not under a claim of title, as well as of all persons coming within the reservation for illegal traffic or other unauthorized or improper purpose, to the prejudice of military discipline or the detriment of the public interests. In removing the person his property may be removed with him. But no unnecessary force should be employed in the process, nor should the use of force be continued after the removal has been effectually accomplished. And where practicable, a reasonable notice to quit will properly be given before force is resorted to.

II. Liability of the military to civil suit or prosecution—*General rule, and its limitations.*

—Officers and soldiers of the Army do not become relieved of their civil obligations by assuming the military character, but, as citizens or civilian inhabitants of the country, remain liable, equally with other civilians, to the jurisdiction of the civil courts for offences against the local laws, as well as for wrongs done or responsibilities incurred toward individuals. In cases, indeed, of offences committed by them on reservations or other places exclusive jurisdiction over which is vested in the United States, they are amenable only to the United States courts. Elsewhere, and for other offences, they are amenable to the process and jurisdiction of the State or other local courts, with the limitations only that enlisted men are, by Sec. 1237, R. S., exempted from arrest on civil process (except for certain debts contracted before enlistment), and that neither officers nor soldiers can legally be arrested at, or removed from, a military post, by the civil authorities, on account of offences against the laws of the land unless due application be made for the purpose in conformity with the 59th Article of War.

Double amenability.—The principle that the amenability of a military person to the civil jurisdiction for a particular act of offence is not affected by the fact that he is amenable to the military jurisdiction for a military offence involved in the same act, or even by the fact that he has been tried and sentenced by a court-martial therefor, is—with its converse—now well established in our law.

Forms of civil amenability.—1. Amenability to the United States. Thus an officer or soldier may become amenable to prosecution for a felonious crime made punishable by a statute of the United States or for an

embezzlement of public money, or to a suit on his bond as a disbursing officer.

2. Amenability to a State or municipality. He may be amenable to a State or Territory for a crime or offence made punishable by its laws, or to a municipality for a violation of a local ordinance or police regulation.

3. Amenability to suit by another military person. An officer, etc., may be sued by an inferior for an alleged illegal or excessive punishment inflicted, unreasonable measure of discipline enforced, or unauthorized arrest or confinement imposed. In such cases the civil courts have in general refused to afford relief except where the act was absolutely illegal, or where absence of probable cause for the action taken, and the existence of malice, on the part of the defendant, have been established by the evidence. An officer or soldier may also be sued by another officer or soldier on account of an alleged libel in an official report, or an alleged false charge or complaint officially preferred or made. In such cases, however, if the report, charge, or complaint is shown to have been made, not causelessly or maliciously but in the discharge of a military duty, the communication will be held to be *privileged*, and one upon which an action for damages cannot be maintained. So, one officer or soldier may be made civilly amenable to another for the consequences of an act of negligence in the performance of duty. Thus, in an English case, where a soldier, on skirmish drill, so negligently discharged his musket as to wound another soldier, he was adjudged liable for damages in a suit instituted on account of the injury. Further, a military person may have, against the officers concerned, a valid ground of action on account of an illegal sentence of court-martial executed upon him. Here the liability to damages on the part of the members of the court, which adjudged the sentence, will, if

held to exist at all, properly be nominal or slight, since a court-martial has no power to effectuate its judgments, and its sentence in any case is no more than a recommendation or advisory opinion; its contribution to the resulting injury, if any, being thus inconsiderable and indirect. On the other hand, the liability of the officer who approved and thus rendered operative the sentence, or who executed it or ordered its execution, will be, proportionately, much more serious.

4. Amenability to suit by a civilian. An officer or soldier may not only be sued for a debt but is liable also in damages to a civilian for any transcending of authority to the detriment of the latter, however honest the motive of the act; the matter of the *animus* only affecting the measure of the damages. He is similarly liable for the execution of an illegal order; and this although such order was received by him from his proper superior, and was executed by him in good faith. If both superior and inferior are subjected to suit by the injured party, the former should be held to the stricter accountability, and a heavier proportion of damages awarded against him.

Liability for injuries in time of war.—For an act done *jure belli*, or in the exercise of a belligerent right, an officer or soldier cannot be called to account in a civil proceeding. Thus an officer is not liable to a suit for the seizure or destruction, in an adequate emergency of war, of the private property of an individual citizen. The existence, however, of war will not justify wanton trespasses upon the persons or property of civilians, or other injuries not sanctioned by the laws or usages of war; nor will it justify wrongs done by irresponsible unauthorized parties. For such acts the offending officer or soldier may be made liable in damages. But in general, in time of war, a greater discretion is conceded

to commanders, and to military persons executing orders. Obligated as they are to act promptly upon emergencies, it would not be fair to hold them to the same strict accountability before the courts as for acts in disregard of private right in time of peace.

Liability on public contracts.—An action will not lie against an officer of the Army on a contract made by him for the United States in an official capacity. Nor can an officer be sued upon a contract of the Government which it is simply his part to execute. Thus a paymaster whose business it is to pay certain troops or employees cannot be sued by an individual for his pay or wages.

Liability of officer as garnishee.—Nor can an officer of the Army (or other public officer) be sued as “garnishee,” for or on account of public money in his official possession. Money in the hands of a disbursing officer remains public funds till actually paid over to the person or persons entitled to receive it as due them. To allow it to be attached would be to divert the moneys of the United States from the specific purposes for which the same have been appropriated by Act of Congress, and would also seriously embarrass, and so far suspend, the operations of the Government.

Liability under writ of habeas corpus—Form of proceeding.—Military officers are not unfrequently made respondents in civil proceedings by the service upon them of writs of *habeas corpus*, sued out by or in behalf of enlisted men or military prisoners claiming to be discharged from the military service or from military custody, on the ground of illegal enlistment, or absence of jurisdiction or authority over them on the part of the military authorities. *State* courts, as it was finally adjudged and settled, in 1871, by the Supreme Court of the

United States, in Tarble's Case,* have no power whatever to discharge such persons when duly held by the authority of the United States. Should any State or municipal tribunal issue a writ of *habeas corpus* in such a case, while the officer in charge of the petitioner and upon whom service is made is not, strictly, required to make any return or response to the same, he will yet, as a matter of comity, always properly do so, so far as to advise the court that he holds the petitioner by the authority of the United States, as an enlisted soldier, military convict, etc., setting forth in brief the status of the individual. He will decline, however, in respectful terms to produce the body of the petitioner before the court, on the ground stated of its want of jurisdiction over the subject-matter. On the return day of the writ, he will properly appear and present his return, whereupon the court will in general as a matter of course dismiss the proceeding. Should the State court assume jurisdiction and actually commit the officer for contempt, he will forthwith sue out a writ of *habeas corpus* for his own release in the U. S. Circuit or District Court. If the State authorities attempt to take the soldier from military custody, they should be prevented by the use of such military force as may be necessary for the purpose.

Where, on the other hand, an officer of the Army is served with a writ of *habeas corpus* issuing from a court of the United States, he will make full return to the same, setting forth all the facts of the case and the authority under which the petitioner is held, and on the return day will appear with the body of the petitioner before the court to abide by its order thereupon.

Defence and indemnification of officer or soldier sued

* 18 Wallace, 397, affirmed in Robb v. Connolly, 111 U. S., 632.

or prosecuted.—Where an officer or soldier is subjected to a suit or prosecution on account of an act done in the performance of official duty, he may apply to the Attorney General, through the Secretary of War, to be defended at the expense of the Government. If, because it is considered that the United States has not a sufficient interest in the controversy, or for other reason, his application is not acceded to, he should proceed himself to make proper provision for his defence. If the result of the litigation be a judgment against him for damages, he may have recourse to Congress for an appropriation to cover the amount of the same, as also of his reasonable expenses in defending the suit. Congress has from time to time passed special acts for the relief of officers of the Army or Navy, who have been subjected to pecuniary losses on account of suits for acts done in the honest discharge of duty.

III. Other civil relations of the military—*Effect in general of the military status.*—Not only in time of war, but frequently also in time of peace, the officers and soldiers of the Army are so isolated by the exigencies and obligations of the military service that they are not in a position to exercise the common rights of the citizen or to become subject to his burdens.

Restriction of civil rights by U. S. statute.—They are also debarred from exercising certain of such rights by express legislation of Congress. Thus by Secs. 1222 and 1223, R. S., officers on the active list are precluded from holding "*any civil office*," and all officers of the Army, whether active or retired, are specially precluded from holding diplomatic or consular office. Further, by Sec. 1860 (as amended by the Act of March 3, 1883), all military persons, except retired officers, are prohib-

ited from holding civil offices in Territories; and by the same section it is declared that no military person "*shall be allowed to vote in any Territory by reason of being on service therein, unless such Territory is, and has been for six months, his permanent domicile.*"

Restrictions and privileges under State laws—Residence.—The constitutions or laws of some of the States contain restrictions upon the capacity to acquire a residence, right to hold office under the State, right of suffrage, etc., on the part of military persons; but, in the absence of such restrictions, a *retired* officer or soldier may hold such office, and *any* officer or soldier may vote if only he has resided in, or inhabited, the State, county, etc., for the period required in cases of civilians. The fact that he is in the military service does not disqualify a person from obtaining a residence; but being, while on the active list, always subject to orders as to the period of his stay at any post or station, he cannot in general exercise the volition or entertain the intention necessary to the selection and acquisition of a legal residence. By the laws, however, of some of the States a mere *habitaney* for a certain period is all that is necessary to entitle the person to exercise the right of suffrage; and an officer or soldier may as freely exercise such right as any other person, provided the place of his *habitaney* be not a locality, the exclusive jurisdiction over which pertains to the United States.

Liability to taxation.—An officer or soldier of the Army is of course liable to be taxed for such *real estate* as he may possess, in the State, etc., in which it may be situate. As to *personal property*, he is in general liable to be taxed therefor, *unless* it be held by him at a post or place within the exclusive jurisdiction of the United States. It is not essential that he should have a permanent residence to subject him to local taxation, personal

property taxes being legally imposable upon mere inhabitants, or upon property *as such*, irrespective of the *status* of the owner.

But in no event can a State or municipality legally tax the pay or allowances of an officer or soldier of the Army, or the arms, uniform, equipments, horses, etc., incident to his rank and office, or required to be employed by him in the military service. This, upon the fundamental principle that no lesser sovereignty or authority can restrict or interfere with the means or instruments by or through which the Government of the United States is administered.

Effect of being stationed at a place over which the United States exercises exclusive jurisdiction.—Where exclusive jurisdiction over a military reservation or post situated within a State is vested in the United States, either by its having expressly reserved the same upon the admission of the State, or by means of the subsequent cession of its own jurisdiction by the State (or—what is equivalent—the consent of the State to the purchase of the land by the United States), the persons stationed or commorant upon the premises become isolated, both territorially and as respects their civil relations. In a political sense, the land is no longer a part of the soil of the State nor are the occupants inhabitants of the State. They are severed from the enjoyment of the rights, and from subjection to the liabilities, of the citizens of the State almost as completely as if they were residents of a foreign country. They have no more right to vote in the State, to send their children to the public schools, to use the public libraries, to be protected by the police or fire department, etc., than have the citizens of another sovereignty. On the other hand, such persons cannot legally be taxed by the State or municipality for their personal property held on the premises, or be required to

perform militia duty, or to serve on juries, or to furnish labor on the roads, etc., in the State, nor are they subject to the civil or criminal process of the local courts, except in so far as the right to execute the same may have been reserved to the State. This is the status not only of the officers and soldiers stationed at the post but of the civil employees and persons permitted to reside upon the reservation.

This peculiar status, however, it need hardly be added, cannot exist where the region in which the post or reservation is situated is still a *Territory*. The authority of the civil officials of an organized Territory emanates, either immediately or mediately, from Congress; and, in the absence of any provision in the legislation of Congress relating to the organization and government of a Territory, or in the Territorial laws, by which officers or soldiers of the Army stationed therein are specially exempted from the jurisdiction of the Territorial courts or authorities, they will be amenable thereto in the same manner and to the same extent as civilians, except in so far as their liability may be affected by an existing state of war.

APPENDIX.

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I

THE ARTICLES OF WAR.

SEC. 1342, (R. S.). The Armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

ARTICLE 1. Every officer now in the Army of the United States shall, within six months from the passing of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these Rules and Articles.

ART. 2. These Rules and Articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath may be taken before any commissioned officer of the Army.

ART. 3. Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated person, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offence, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.

ART. 4. No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field-officer of the regiment to which he belongs, or by the commanding officer, when no field-officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial,

ART. 5. Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.

ART. 6. Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster-rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 7. Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and

the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.

ART. 8. Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop or company, or garrison under his command; or of the arms, ammunition, clothing or other stores, thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

ART. 9. All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.

ART. 10. Every officer commanding a troop, battery, or company, is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.

ART. 11. Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort,

post, or barrack, may, in the absence of his field-officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.

ART. 12. At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster-rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster-rolls, shall be transmitted by the mustering officer to the Department of War, as speedily as the distance of the place and muster will admit.

ART. 13. Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.

ART. 14. Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster-roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 15. Any officer who, wilfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service.

ART. 16. Any enlisted man who sells, or wilfully or

through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.

ART. 17. Any soldier who sells or through neglect loses or spoils his horse, arms, clothing, or accoutrements shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.

ART. 18. Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessaries of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service.

ART. 19. Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

ART. 20. Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

ART. 21. Any officer or soldier who, on any pretence whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 22. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard,

shall suffer death, or such other punishment as a court-martial may direct.

ART. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 24. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.

ART. 25. No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.

ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.

ART. 27. Any officer or non-commissioned officer, commanding a guard, who knowingly, and willingly, suffers any person to go forth to fight a duel, shall be

punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.

ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers, who subject themselves to discipline.

ART. 29. Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings thereon.

ART. 30. Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless

and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

ART. 31. Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.

ART. 32. Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

ART. 33. Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.

ART. 34. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.

ART. 35. Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offence.

ART. 36. No soldier belonging to any regiment, troop, battery, or company, shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.

ART. 37. Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.

ART. 38. Any officer who is found drunk on his

guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked or tattooed.

ART. 39. Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

ART. 40. Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in case of urgent necessity, shall be punished as a court-martial may direct.

ART. 41. Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.

ART. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

ART. 43. If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.

ART. 44. Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall

suffer death, or such other punishment as a court-martial may direct.

Art. 45. Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.

Art. 46. Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

Art. 47. Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

Art. 48. Every soldier who deserts the service of the United States shall be liable to serve for such period as shall with the time he may have served previous to his desertion amount to the full term of his enlistment, and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

Art. 49. Any officer who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

Art. 50. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company without a regular discharge from the regiment, troop, or company in which he last served, on penalty of being reputed a deserter and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not,

after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall by a court-martial be cashiered.

ART. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States shall in time of war suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 52. It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall for his first offence forfeit one-sixth of a dollar; for each further offence he shall forfeit a like sum and be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.

ART. 53. Any officer who uses any profane oath or execration shall for such offence forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offences shall be applied as therein provided.

ART. 54. Every officer commanding in quarters, garrison, or on the march shall keep good order and to the utmost of his power redress all abuses or disorders which may be committed by any officer or soldier under his command; and if upon complaint made to him of officers or soldiers beating or otherwise ill-treating any

person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished as a court-martial may direct.

ART. 55. All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States (unless by order of a general officer commanding a separate army in the field), shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.

ART. 56. Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death or such other punishment as a court-martial may direct.

ART. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.

ART. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States,

and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or district in which such offence may have been committed.

ART. 59. When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

ART. 60. Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof for approval or payment any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States, by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining or aiding others to obtain, the approval, allowance or payment of any

claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

Who, for the purpose of obtaining or aiding others to obtain the approval, allowance, or payment of any claim against the United States, or any officer thereof, makes, or procures or advises the making of any oath to any fact or to any writing or other paper, knowing such oath to be false; or

Who, for the purpose of obtaining or aiding others to obtain the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance,

arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentenced by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ART. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.

ART. 63. All retainers to the camp and all persons serving with the armies of the United States in the field,

though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the Articles of War, and shall be subject to be tried by courts-martial.

ART. 65. Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.

ART. 66. Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

ART. 67. No provost-marshal or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.

ART. 68. Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 69. Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 70. No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.

ART. 71. When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

ART. 72. Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

ART. 73. In time of war the commander of a division or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

ART. 74. Officers who may appoint a court-martial

shall be competent to appoint a judge advocate for the same.

ART. 75. General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.

ART. 76. When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall, thereupon, order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

ART. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.

ART. 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.

ART. 79. Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

[ART. 80. In time of war a field officer may be detailed in every regiment, to try soldiers thereof for offences not capital; and no soldier serving with his regiment shall

be tried by a regimental or garrison court-martial when a field-officer of his regiment may be so detailed.*]

ART. 81. Every officer commanding a regiment or corps shall, subject to the provisions of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offences not capital.

ART. 82. Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offences not capital.

ART. 83. Regimental and garrison courts-martial, and field-officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.

ART. 84. The judge advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the

* Repealed by Act of June 18, 1898.

proper authority, except to the judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

ART. 85. When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following form: "You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

ART. 86. A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder.

ART. 87. All members of a court-martial are to behave with decency and calmness.

ART. 88. Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

ART. 89. When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty.

ART. 90. The judge advocate, or some person deputed by him, or by the general or officer commanding the army, detachment, or garrison, shall prosecute in the

name of the United States; but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.

ART. 91. The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.

ART. 92. All persons who give evidence before a court-martial shall be examined on oath or affirmation, in the following form: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

ART. 93. A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often as may appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

ART. 94. Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example.

ART. 95. Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

ART. 96. No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

ART. 97. No person in the military service shall, un-

der the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.

ART. 98. No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

ART. 99. No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.

ART. 100. When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 101. When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offence.

ART. 102. No person shall be tried a second time for the same offence.

ART. 103. No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offence, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be ex-

cluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service.

ART. 104. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.

ART. 105. No sentence of a court-martial inflicting the punishment of death shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerilla marauders, convicted; in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

ART. 106. In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

ART. 107. No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the Army in the field to which the division or brigade belongs.

ART. 108. No sentence of a court-martial either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President.

ART. 109. All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for

the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.

[ART. 110. No sentence adjudged by a field-officer, detailed to try soldiers of his regiment, shall be carried into execution, until the same shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post or camp.*]

ART. 111. Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.

ART. 112. Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.

ART. 113. Every judge advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge Advocate General of the Army, in whose office they shall be carefully preserved.

ART. 114. Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.

* Repealed by Act of June 18, 1898.

ART. 115. A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.

ART. 116. A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

ART. 117. The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward: so help you God." After which the president of the court shall administer to the recorder the following oath: "You, A B, do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing; so help you God."

ART. 118. A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

ART. 119. A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

ART. 120. The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.

ART. 121. The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer: *Provided*, That the circumstances are such that oral testimony cannot be obtained.

ART. 122. If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.

ART. 123. In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.

ART. 124. Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.

ART. 125. In case of the death of any officer, the major of his regiment, or the officer doing the major's

duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.

ART. 126. In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.

ART. 127. Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.

ART. 128. The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.

SEC. 1343. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

STATUTORY PROVISIONS IN THE NATURE OF
ARTICLES OF WAR.

SEC. 1202, R. S. Every judge advocate of a court martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.

SEC. 1203, R. S. The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short-hand. The reporter shall, before entering upon his duty, be sworn or affirmed, faithfully to perform the same.

SEC. 1228, R. S. No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate.

SEC. 1229, R. S. The President is authorized to drop from the rolls of the Army for desertion, any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

SEC. 1230, R. S. When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-

martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

SEC. 1326, R. S. The Superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial.

The three Sections next following relate to offences committed at the Military Prison at Fort Leavenworth, Kansas:

SEC. 1359, R. S. Any officer who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall be dismissed from the service, and suffer such other punishment as a court-martial may inflict.

SEC. 1360, R. S. Any soldier or other person employed in the prison, who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall, upon conviction by a court-martial, be confined therein not less than one year.

SEC. 1361, R. S. All persons under confinement in said military prison undergoing sentence of court-martial, shall be liable to trial and punishment by court-martial under the Rules and Articles of War for offences committed during the said confinement.

SEC. 1621, R. S. The Marine Corps, when detached for service with the Army, by order of the President, . . . shall be subject to the Rules and Articles of War prescribed for the government of the Army.

SEC. 1658, R. S. Courts-martial for the trial of militia shall be composed of militia officers only.

SECS. 1996, 1998, R. S. Every person who hereafter deserts the military (or naval) service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military (or naval) service, lawfully ordered, shall be deemed to have voluntarily relinquished and forfeited his right of citizenship, as well as his right to become a citizen; and such person shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of a citizen thereof.

ACT OF MARCH 3, 1877, c. 102, s. 1. Hereafter the records of the regimental, garrison, and field officers' courts-martial, shall, after having been acted upon, be retained and filed in the Judge Advocate's office at the Headquarters of the Department Commander in whose department the courts were held, for two years, at the end of which time they may be destroyed.

ACT OF MARCH 16, 1878, c. 37. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness.

And his failure to make such request shall not create any presumption against him.

ACT OF SEPT. 27, 1890, c. 998. Whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offence is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.

[The code of *maximum punishments* prescribed by the President under this Act is published in G. O. 16 of 1898, set forth below.]

ACT OF JUNE 18, 1898. To promote the administration of justice in the Army.

SEC. 1. That the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer to be designated by him, before whom enlisted men who are to be tried for offences such as were prior to the passage of the Act 'to promote the administration of justice in the Army,' approved October first, eighteen hundred and ninety, cognizable by garrison or regimental courts-martial, and offences cognizable by field officers detailed to try offenders under the provisions of the eightieth and one hundred and tenth articles of war, shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable, except when the accused is to be tried by general court-martial; but such summary court may be appointed and the officer designated by superior authority when by him deemed desirable; and the officer holding the summary court shall have power to administer oaths and to hear and determine such cases, and when satisfied of the guilt of

the accused adjudge the punishment to be inflicted, which said punishment shall not exceed confinement at hard labor for one month and forfeiture of one month's pay, and, in the case of a non-commissioned officer, reduction to the ranks in addition thereto; that there shall be a summary court record kept at each military post and in the field at the headquarters of the proper command, in which shall be entered a record of all cases heard and determined and the action had thereon; and no sentence adjudged by said summary court shall be executed until it shall have been approved by the officer appointing the court, or by the officer commanding for the time being: *Provided*, That when but one commissioned officer is present with a command he shall hear and finally determine such cases: *And provided further*, That no one while holding the privileges of a certificate of eligibility to promotion shall be brought before a summary court, and that non-commissioned officers shall not, if they object thereto, be brought to trial before summary courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be.

SEC. 3. That the commanding officers authorized to approve the sentences of summary courts and superior authority shall have power to remit or mitigate the same.

SEC. 4. That post and other commanders shall, in time of peace, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offences committed and the penalties awarded, which report shall be filed in the office of the judge advocate of the department, and may be destroyed when no longer of use.

SEC. 6. That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government.

ACT OF JULY 27, 1892, c. 272. [SEC. 1 consists of amendments of the 17th, 84th, 104th and 110th Articles of War, which are incorporated in those Articles as herein above set forth.]

SEC. 2. That whenever a court-martial shall sit in closed session the judgeadvocate shall withdraw, and when his legal advice or his assistance in referring to recorded evidence is required it shall be obtained in open court.

SEC. 3. That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offence and made punishable by court-martial, under the 62d Article of War.*

SEC. 4. That judge advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration.

Code of Maximum Punishments.

| | |
|-------------------|----------------------------|
| GENERAL ORDERS,) | HEADQUARTERS OF THE ARMY, |
| No. 16.) | ADJUTANT GENERAL'S OFFICE, |
| | WASHINGTON, April 6, 1898. |

By direction of the Secretary of War, the following Executive order is published for the information and guidance of all concerned :

EXECUTIVE MANSION,
March 30, 1898.

The Executive order, dated March 20, 1895, establishing limits of punishment for enlisted men of the

* See definition of "fraudulent enlistment," as given in Circ. 13, H. Q. A., of 1892.

Army, under an act of Congress approved September 27, 1890, and which was published in General Orders, No. 16, 1895, Headquarters of the Army, is amended so as to prescribe as follows:

ARTICLE I.

In all cases of desertion the sentence may include dishonorable discharge and forfeiture of pay and allowances.

Subject to the modifications authorized in Section 3 of this article the limit of the term of confinement (at hard labor) for desertion shall be as follows:

SECTION 1. In case of surrender—

(a) When the deserter surrenders himself after an absence of not more than thirty days, one year.

(b) When the surrender is made after an absence of more than thirty days, eighteen months.

SEC. 2. In case of apprehension—

(a) When at the time of desertion the deserter shall not have been more than six months in the service, eighteen months.

(b) When he shall have been more than six months in the service, two and one-half years.

SEC. 3. The foregoing limitations are subject to modification under the following conditions:

(a) The punishment of a deserter may be increased by one year of confinement at hard labor in consideration of each previous conviction of desertion.

(b) The punishment for desertion when joined in by two or more soldiers in the execution of a conspiracy, or for desertion in the presence of an outbreak of Indians or of any unlawful assemblage which the troops may be opposing, shall not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

ARTICLE II.

Except as herein otherwise indicated punishments shall not exceed the limits prescribed in the following table:

| Offences. | Limits of punishment. |
|--|---|
| UNDER 17TH ARTICLE OF WAR. | |
| Selling horse or arms, or both.... | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years. |
| Selling accoutrements..... | Four months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Selling clothing..... | Two months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Losing or spoiling horse or arms through neglect. | Four months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Losing or spoiling accoutrements or clothing through neglect. | One month's confinement at hard labor and forfeiture of \$10; for non-commissioned officer, reduction in addition thereto. |
| UNDER 20TH ARTICLE OF WAR. | |
| Behaving himself with disrespect to his commanding officer. | Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| UNDER 24TH ARTICLE OF WAR. | |
| Refusal to obey or using violence to officer or non-commissioned officer while quelling quarrels or disorders. | Dishonorable discharge, with forfeiture of all pay and allowances and confinement at hard labor for two years. |
| UNDER 32D ARTICLE OF WAR. | |
| <i>Absence without leave—*</i> | |
| One hour or less..... | Forfeiture of \$1; corporal, \$2; sergeant, \$3; 1st sergeant or non-commissioned officer of higher grade, \$4. |
| For more than one to six hours, inclusive. | Forfeiture of \$2; corporal, \$3; sergeant, \$4; 1st sergeant or non-commissioned officer of higher grade, \$5. |
| For more than six to twelve hours, inclusive. | Forfeiture of \$3; corporal, \$4; sergeant, \$6; 1st sergeant or non-commissioned officer of higher grade, \$7. |
| For more than twelve to twenty-four hours, inclusive. | Forfeiture of \$5; corporal, \$6; sergeant, \$7; 1st sergeant or non-commissioned officer of higher grade, \$10. |

* Upon trial for desertion and conviction of absence without leave only, the court may, in addition to the limit prescribed for such absence, award a stoppage of the amount paid for apprehension, and for transportation of himself and guard.

| Offences. | Limits of punishment. |
|---|--|
| UNDER 32D ARTICLE OF WAR—Con. | |
| For more than twenty-four to forty-eight hours, inclusive. | Forfeiture of \$6 and five days' confinement at hard labor. For corporal, forfeiture of \$8; sergeant, \$10; 1st sergeant or non-commissioned officer of higher grade, \$12, or, for all non-commissioned officers, reduction. |
| For more than two to ten days, inclusive. | Forfeiture of \$10 and ten days' confinement at hard labor; for non-commissioned officer, reduction in addition thereto. |
| For more than ten to thirty days, inclusive. | Forfeiture of \$20 and one month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto. |
| For more than thirty to ninety days, inclusive. | Three months' confinement at hard labor and forfeiture of \$10 per month for same period; for non-commissioned officer, reduction in addition thereto. |
| For more than ninety days..... | Dishonorable discharge and forfeiture of all pay and allowances and six months' confinement at hard labor. |
| UNDER 33D ARTICLE OF WAR. | |
| <i>Failure to repair at the time fixed, to the place appointed, etc.—</i> | |
| For reveille or retreat roll-call and 11 p.m. inspection. | Forfeiture of \$1; corporal, \$2; sergeant, \$3; 1st sergeant, \$4. |
| For assembly of guard detail..... | { Forfeiture of \$5; corporal, \$8; sergeant, \$10. |
| For guard mounting (by musician detailed for guard). | |
| For guard mounting (by musician not detailed for guard). | { Forfeiture of \$2; corporal, \$3; sergeant, \$5. |
| For assembly of fatigue detail.... | |
| For dress parade | |
| For inspection and muster, weekly or monthly inspection. | |
| For target practice..... | |
| For drill..... | |
| For stable duty..... | |
| For athletic exercises..... | |
| UNDER 38TH ARTICLE OF WAR. | |
| <i>Found drunk—</i> | |
| On guard..... | Six months confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| On duty as head cook..... | Forfeiture of \$20. |
| On extra or special duty | { Forfeiture of \$12; for non-commissioned officer, reduction and forfeiture of \$20. |
| At formation of company for drill or on drill. | |
| At target practice..... | |
| At formation of company for dress parade or on dress parade. | |
| At reveille or retreat roll-call.... | |
| At inspection and muster, weekly or monthly inspection. | |
| At inspection of company guard detail or at guard mounting. | |
| At stable duty..... | |
| On fatigue | |

| Offences. | Limits of punishment. |
|---|--|
| UNDER 40TH ARTICLE OF WAR. | |
| Quitting guard..... | Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| UNDER 51ST ARTICLE OF WAR. | |
| Persuading soldiers to desert. . | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |
| UNDER 60TH ARTICLE OF WAR. | |
| UNDER 62D ARTICLE OF WAR. | |
| Manslaughter. | Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor. |
| Assault, with intent to kill..... | Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor. |
| Burglary..... | Dishonorable discharge, forfeiture of all pay and allowances, and five years' confinement at hard labor. |
| Forgery..... | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| Perjury..... | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| False swearing..... | Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor. |
| Robbery | Dishonorable discharge, forfeiture of all pay and allowances, and six years' confinement at hard labor. |
| Larceny or embezzlement of property—* | |
| Of the value of more than \$100..... | Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor. |
| Of the value of \$100 or less and more than \$50. | Dishonorable discharge, forfeiture of all pay and allowances, and three years' confinement at hard labor. |
| Of the value of \$50 or less and more than \$30. | Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor. |
| Of the value of \$20 or less.... | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |
| Fraudulent enlistment, procured by false representation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to conviction of a civil or military crime. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. |
| Fraudulent enlistment, other cases of. | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. |

* In specifications to charges of larceny or embezzlement the value of the property shall be stated.

| Offences. | Limits of punishment. |
|--|--|
| UNDER 62D ARTICLE OF WAR—Con. | |
| Disobedience of orders, involving wilful defiance of the authority of a non-commissioned officer in the execution of his office. | Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Using threatening or insulting language or behaving in an insubordinate manner to a non-commissioned officer while in the execution of his office. | One month's confinement at hard labor and forfeiture of \$10; for non-commissioned officer, reduction in addition thereto. |
| Absence from fatigue duty..... | Forfeiture of \$4; corporal, \$5; sergeant, \$6. |
| Absence from extra or special duty. | Forfeiture of \$4; corporal, \$5; sergeant, \$6. |
| Absence from duty as company, general mess, or hospital head cook. | Forfeiture of \$10. |
| Introducing liquor into post, camp, or quarters in violation of standing orders. | Forfeiture of \$3. For non-commissioned officer, reduction and forfeiture of \$5. |
| Drunkenness at post or in quarters. | Forfeiture of \$3. For non-commissioned officer, reduction and forfeiture of \$5. |
| Drunkenness and disorderly conduct, causing the offender's arrest and conviction by civil authorities at a place within ten miles of his station. | Forfeiture of \$10 and seven days' confinement at hard labor. For non-commissioned officer, reduction and forfeiture of \$12. |
| Noisy or disorderly conduct in quarters. | Forfeiture of \$4; corporal, \$7; sergeant, \$10. |
| Drunk and disorderly in post or quarters. | Forfeiture of \$7; for non-commissioned officer, reduction and forfeiture of \$10. |
| Abuse by non-commissioned officer of his authority over an inferior. | Reduction, three months' confinement at hard labor, and forfeiture of \$10 per month for the same period. |
| Non-commissioned officer encouraging gambling. | Reduction and forfeiture of \$5. |
| Non-commissioned officer making false report. | Reduction, forfeiture of \$8, and ten days' confinement at hard labor. |
| Sentinel allowing a prisoner under his charge to escape through neglect. | Six months' confinement at hard labor and forfeiture of \$10 per month for the same period. |
| Sentinel wilfully suffering prisoner under his charge to escape. | Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor. |
| Sentinel allowing a prisoner under his charge to obtain liquor. | Two months' confinement at hard labor and forfeiture of \$10 per month for the same period. |
| Sentinel or member of guard drinking liquor with prisoners. | Two months' confinement at hard labor and forfeiture of \$10 per month for the same period. |
| Disrespect or affront to a sentinel. | Two months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Resisting or disobeying sentinel in lawful execution of his duty. | Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Lewd or indecent exposure of person. | Three months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto. |
| Committing nuisance in or about quarters. | |

ARTICLE III.

The introduction and use of evidence of previous convictions is subject to the following regulations:

1. Such evidence shall be limited to previous convictions by courts-martial of an offence or offences within one year preceding the arraignment and during the current enlistment. These convictions must be proved by the records of previous trials and convictions, or by duly authenticated copies of such records, or by duly authenticated copies of the orders promulgating such trials and convictions. Charges forwarded to the authority competent to order a general court-martial, or submitted to a summary, garrison, or regimental court-martial, must be accompanied by the proper evidence of previous convictions.

2. Whenever a soldier is convicted of an offence for which a discretionary punishment is authorized, the court will receive evidence of previous convictions, if there be any. General, regimental, and garrison courts-martial will, after a finding of guilty, be opened for the purpose of ascertaining whether there is such evidence and, if so, of receiving it.

3. *Previous convictions in connection with inferior court offences.*—When a soldier is convicted of an offence the punishment for which under Article II of this order or the custom of the service does not exceed that which an inferior court-martial may adjudge, the punishment so authorized may, upon proof of four or less previous convictions within the prescribed period, be increased one-half for each of such previous convictions; provided that upon proof of five or more such previous convictions, the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months.

4. *Previous convictions in connection with general court-martial offences.*—When the conviction is for an offence punishable under Article II of this order or the custom of the service with a greater punishment than an inferior court can award, such punishment, if it includes

dishonorable discharge, shall not be increased by reason of previous convictions, but evidence thereof, whatever their number within the prescribed period, will be submitted to the court to aid it in determining upon the proper measure of punishment, subject to the limit already authorized.

If the authorized punishment under Article II of this order or the custom of the service exceeds what an inferior court can award and does not include dishonorable discharge, such punishment shall not be increased on account of previous convictions if less than five are considered, but if there be five or more the court may adjudge dishonorable discharge and forfeiture of all pay and allowances with the authorized confinement, and when this confinement is less than three months it may be increased to three months.

5. On a conviction of desertion evidence of convictions of previous desertions may also be introduced, irrespective of the period which may have elapsed since such conviction or convictions.

6. When a non-commissioned officer is convicted of an offence not punishable with reduction, he may, upon proof of one previous conviction within the prescribed period, be sentenced to reduction in addition to the punishment already authorized.

ARTICLE IV.

When a soldier shall, on one arraignment, be convicted of two or more offences, none of which is punishable under Article II of this order or the custom of the service with dishonorable discharge, but the aggregate term of confinement for which may exceed six months, dishonorable discharge with forfeiture of pay and allowances may be awarded in addition to the authorized confinement.

ARTICLE V.

This order prescribes the *maximum* limit of punishment for the offences named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases the punishment should be

graded down according to the extenuating circumstances. Offences not herein provided for remain punishable as authorized by the Articles of War and the custom of the service.

ARTICLE VI.

Summary courts are subject to the restrictions named in the 83d Article of War. Soldiers against whom charges may be preferred for trial by summary court shall not be confined in the guardhouse, but shall be placed in arrest in quarters, before and during trial and while awaiting sentence, except when in particular cases restraint may be necessary.

ARTICLE VII.

Substitutions for punishment named in Article II of this order are authorized at the discretion of the courts at the following rates:

Two days' confinement at hard labor for one dollar forfeiture; or the reverse; one day's solitary confinement on bread and water diet for two days' confinement at hard labor or for one dollar forfeiture; provided that a non-commissioned officer not sentenced to reduction shall not be subject to confinement; and provided that solitary confinement shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year.

ARTICLE VIII.

Non-commissioned officers above the rank of corporal shall not, if they object thereto, be brought to trial before regimental, garrison, or summary courts-martial without the authority of the officer competent to order their trial by general court-martial; nor shall sergeants of the post non-commissioned staff or hospital stewards be reduced, but they may be dishonorably discharged whenever reduction is included in the limit of punishment.

WILLIAM MCKINLEY.

BY COMMAND OF MAJOR GENERAL MILES:

H. C. CORBIN, *Adjutant General*.

II.

FORMS OF CHARGES.

UNDER ARTICLE 5.

Charge.—False muster, in violation of the Fifth Article of War.

Specification.—In that A. B., Captain, etc., at an official muster of (*describe the command*), did unlawfully include and muster as a soldier and member of said command one C. D., known to him to be not a soldier but a civilian.

This at (or at or near), on or about

UNDER ARTICLE 14.

Charge.—False muster, in violation of the Fourteenth Article of War.

Specification.—In that A. B., Captain, etc., did sign an official muster roll of his said company for the month of, which contained and included the names of C. D., E. F., and G. H., privates and members of said company, as being present for duty with the same, whereas, in fact, the said C. D., E. F., and G. H. were, with the knowledge and connivance of him the said A. B., wholly absent from said company and from military duty.

This at, on or about

UNDER ARTICLE 20.

Charge.—Disrespect toward his commanding officer, in violation of the Twentieth Article of War.

Specification.—In that A. B., Captain, etc., did behave with disrespect toward his commanding officer, Colonel C. D., etc., by saying to him—(*give language used, and, if in the presence of other officers or of soldiers, so state*).

Or—by saying of or in regard to him—(*give language or substance, and, if in the presence of other officers, etc., so state*).

Or, by—(*state acts or conduct manifesting disrespect*).

This at, on or about

UNDER ARTICLE 21.

Charge.—Offering violence against his superior officer, in violation of the Twenty-first Article of War.

Specification.—In that A. B., Private, etc., did offer violence against his superior officer, Captain C. D., etc., then being in the execution of his office, by threatening him and attempting to strike him, with his musket.

This at, on or about

Charge.—Disobedience of Orders, in violation of the Twenty-first Article of War.

Specification.—In that A. B., Captain, etc., having received from his superior and commanding officer C. D., Colonel, etc., a lawful command and order, requiring him to—(*state what the order required*); *or*—a lawful command and order in writing, expressed as follows, namely—(*give the written order in full*); did, nevertheless, deliberately refuse (*or wholly neglect*) to obey said order.

This at, on or about

UNDER ARTICLE 22.

Charge.—Joining in a mutiny in violation of the Twenty-second Article of War.

Specification.—In that A. B., a private of the Regiment of, upon a mutiny having been begun and excited in said regiment against the authority of the post commander, Captain C. D., upon the occasion of the confinement in the guard-house, by the order of said post commander, of E. F., a private of said regiment, did join in the said mutiny, and, in combination with sundry other members of said regiment assembled on the parade-ground, did stack arms, and though ordered by said commander to return to his quarters, did, with his associates, refuse to disperse or to do any further duty until the said E. F. should be released from his confinement.

This at, on or about

UNDER ARTICLE 23.

Charge.—Failing properly to endeavor to suppress a mutiny, in violation of the Twenty-third Article of War.

Specification.—In that A. B., Captain Co. A,, United States Infantry, being present at a mutiny among the soldiers of his company, and of said regiment, against the authority of the regimental commander, did fail to use his utmost endeavor to suppress the same, but did simply command the men of his own company to return to their quarters, and, on their refusing, took no means to compel their obedience or reduce them to discipline.

This at on or about

UNDER ARTICLE 32.

Charge.—Absence without leave, in violation of the Thirty-second Article of War.

Specification.—In that A. B., Private, etc., did, without leave from his commanding officer, absent himself from his company, from to (*specifying duration of absence*).

This at, on or about (the dates above-mentioned).

Or—In that A. B., private, etc., having received a pass authorizing him to be absent from his company till, did, at the end of said time, neglect duly to return but did remain absent, without leave from his commanding officer, till

This at, on or about (the dates above mentioned).

UNDER ARTICLE 33.

Charge.—Drunkenness on duty, in violation of the Thirty-eighth Article of War.

Specification.—In that A. B., Captain, etc., having been duly detailed as officer of the day of the Post of and having entered upon said duty, was found drunk thereon.

This at, on or about

Or—In that A. B., Private, etc., having been duly detailed as a member of the Post guard, and having entered upon said duty, was found drunk thereon.

This at, on or about

UNDER ARTICLE 39.

Charge.—Sleeping on post, in violation of the Thirty-ninth Article of War.

Specification.—In that A. B., Private, etc., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), was found by (*officer of the day, officer of the guard*), etc., asleep on his said post.

This at, on or about

Charge.—Leaving post in violation of the Thirty-ninth Article of War.

Specification.—In that A. B., Private, etc., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), did, before being regularly relieved, leave said post and go to (*state where he went, etc.*).

This at, on or about

UNDER ARTICLE 42.

Charge.—Misbehavior before the enemy, in violation of the Forty-second Article of War.

Specification.—In that Major A. B., commanding
....., having been ordered forward with his said command to engage the enemy, did, while said command was advancing and under fire, abandon the same and seek safety at the rear, and did not reappear until the engagement was concluded.

This at, on or about

Charge.—Quitting his post to plunder and pillage, in violation of the Forty-second Article of War.

Specification.—In that A. B., Private, etc., being on duty with his regiment in the field, did quit his post and colors for the purpose of plunder and pillage, and did commit plunder and pillage of the property of one C. D., a citizen, by forcibly entering the house of said

C. D., against his will, and taking therefrom and appropriating money and effects of the said C. D., of the value of dollars.

This at, on or about

UNDER ARTICLE 46.

Charge.—Corresponding with the enemy, in violation of the Forty-sixth Article of War.

Specification.—In that A. B.,, did directly hold correspondence with and give intelligence to the enemy, by writing and transmitting secretly through the lines to one C. D., an officer of the enemy's army, a communication in words and figures following, to wit: (*Insert communication containing material information*).

This at, on or about

UNDER ARTICLE 47.

Charge.—Desertion, in violation of the Forty-seventh Article of War.

Specification.—In that A. B., Private, etc., having been duly enlisted in the military service of the United States, did desert the same, and did remain absent as a deserter therefrom till arrested at, by, on

Or—having been duly enlisted, etc., and having received a furlough authorizing him to be absent from said service, from to, did not at said last date return to said service, but did continue to remain absent with the intent to abandon the same, and did actually remain absent as a deserter therefrom till arrested at, by, on

This at, on or about

UNDER ARTICLE 50.

Charge.—Desertion, in violation of the Fiftieth Article of War.

Specification.—In that A. B., Private, Company A, First Regiment United States Infantry, did, without having been regularly discharged from said company and regiment, enlist himself in the Second Regiment United States Cavalry.

This at, on or about

UNDER ARTICLE 57.

Charge.—Forcing a safeguard in violation of the Fifty-seventh Article of War.

Specification.—In that A. B., Private, etc., did, with other soldiers of his regiment, force a safeguard known to him to have been placed over the house and premises of one C. D., an inhabitant of the country, by overpowering the guard posted for the protection of the same, and violently entering said premises and committing waste and plunder therein.

This at (*a place "in foreign parts"*) on or about....

Or—This at (*a place within the United States*) on or about....., and during rebellion against the supreme authority of the United States.

UNDER ARTICLE 58.

Charge.—Murder, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did, feloniously and with malice aforethought, kill C. D., Private, etc., by shooting him with his rifle.

This, in time of war, at....., on or about.....

Charge.—Manslaughter, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously kill one C. D., a civilian, by shooting him with a pistol.

This, in time of war, at....., on or about.....

Charge.—Mayhem, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., in a personal combat with C. D., Private, etc., did unlawfully and feloniously inflict a violent injury upon and wholly blind one of his eyes, thereby depriving him, the said C. D., of the use of that member in battle, and disabling him for active service as a soldier.

This, in time of war, at....., on or about.....

Charge.—Robbery, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously make an assault upon one C. D., a civilian, and, by means of violence, take from his person property belonging to him, to wit, fifty dollars in gold.

This, in time of war, at....., on or about.....

Charge.—Arson, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously set fire to and burn the dwelling-house of one C. D., a civilian.

This, in time of war, at....., on or about.....

Charge.—Burglary, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously break into and enter, in the night-time, the dwelling-house of one C. D., a civilian, with intent to commit larceny therein,

This, in time of war, at, on or about

Charge.—Larceny, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously take and carry away a gold watch, of the value of one hundred dollars, the property of one C. D., a civilian, against the will and consent of him, the said C. D., and with the intent of appropriating the same to his, the said A. B.'s, own use.

This, in time of war, at, on or about

Charge.—Rape, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously have carnal knowledge of and ravish one C. D., by means of force and against her will and consent.

This, in time of war, at, on or about

Charge.—Assault and battery, in violation of the Fifty-eighth Article of War.

Specification.—In that A. B., Private, etc., did unlawfully and feloniously assault and beat one C. D., a civilian, by knocking him down with his musket.

This, in time of war, at, on or about

UNDER ARTICLE 60.

Charge.—Presenting a fraudulent claim, in violation of the Sixtieth Article of War.

Specification.—In that A. B., Captain, etc., having duly received from Major C. D., Paymaster United States Army, at Washington, D. C., his monthly pay for the month of January, 1886, did, notwithstanding, subsequently make and present to Major E. F., Paymaster United States Army, a second pay account and claim for

pay for the same month, well knowing that said claim was false and fraudulent.

This at the City of New York, on or about.....

Charge.—Embezzlement, in violation of the Sixtieth Article of War.

Specification.—In that A. B., Captain, etc., being a disbursing officer of the United States, and as such having in his possession public funds of the United States, furnished and intended for the military service thereof, and duly intrusted to his charge for disbursement in and for said service, did wrongfully and in violation of said trust, embezzle, and knowingly and wilfully apply to his own use and benefit, by (*specify the manner, purpose, etc., of the personal application*), a portion of said funds, to wit, the sum of dollars.

This at, on or about

Charge.—Embezzlement, in violation of the Sixtieth Article of War.

Specification.—In that A. B., Captain, etc., being a disbursing officer of the United States, and being as such authorized to draw for proper purposes official checks upon, a public depository of the United States, in which were deposited public funds furnished and intended for the military service of the United States, did, for a purpose not prescribed or authorized by law, to wit, for the payment of a personal debt, withdraw by check a portion of said funds, to wit, the sum of dollars: this in violation of Sec. 5488, Revised Statutes.

This at, on or about

Charge.—Wrongfully and knowingly disposing of public property, in violation of the Sixtieth Article of War.

Specification.—In that A. B., Private, etc., did, in deserting from the military service, wrongfully and knowingly dispose of certain ordnance stores (*or clothing, etc.*), property of the United States, and furnished to him for use in said service, to wit (*specify articles with their values*), the same being property for which Captain C. D., etc., was accountable.

This at, on or about

UNDER ARTICLE 61.

Charge.—Conduct unbecoming an officer and a gentleman, in violation of the Sixty-first Article of War.

Specification.—In that A. B., Captain, etc., having conducted an unsuccessful expedition against hostile Indians, which had failed mainly through his negligence, did make and forward to his commanding officer, Colonel C. D., etc., an official report of said expedition in which were contained certain statements as follows, to wit:

(*Quote the statements so far as material.*)

Which said statements were wholly, or in great part, false; and were made by him, the said A. B., for the purpose of deceiving his said commanding officer as to the matter of the responsibility for the failure of the said expedition.

This at, on or about

Charge.—Conduct unbecoming an officer and a gentleman.

Specification.—In that A. B., Captain, etc., having become, on (*state the date*), justly indebted to C. D., a civilian, in the sum of dollars, for articles sold and furnished by said C. D. to him the said A. B., by reason and upon the faith of the express

offer and assurance of him, the said A. B., that the same should be fully paid for at the end of the then month, did nevertheless neglect, without due cause or excuse, to pay for the same at that time, and, though repeatedly applied to for payment, for more than one year succeeding; and, upon then, to wit, on (*state the date*), being urgently pressed by said C. D. for payment, did evade the same by representing to said C. D. that he was wholly without means for such payment; which said representation was knowingly false, he, the said A. B., being in fact possessed of ample means for the payment of said debt.

This at, on the dates above mentioned.

Charge.—Conduct unbecoming an officer and a gentleman.

Specification.—In that A. B., Captain, etc., having had a charge preferred against him for drunkenness, by his commanding officer, Colonel C. D., etc., did, on (*state the date*), in order to induce the withdrawal of said charge, and to escape a trial thereon, make and give to his said commander a written promise and pledge, upon honor, expressed in terms as follows, to wit:

(Insert pledge to abstain from spirituous liquors for a certain time stated.)

Whereupon, in consideration of the said promise and pledge, the said Colonel C. D. did not forward for trial the said charge but withdrew the same; but, notwithstanding, he the said A. B., Captain, etc., did soon after, to wit on, become drunk.

This at, on the dates above mentioned.

UNDER ARTICLE 62.

Charge.—Absence without leave, to the prejudice of good order and military discipline.

Specification.—In that A. B., Captain, etc., did without authority absent himself from his post, command and duties, for one week, to wit from to, 1886.

This at, on and between the dates mentioned.

Charge.—Neglect of duty, to the prejudice of good order and military discipline.

Specification.—In that A. B., Major, etc., commanding a detachment operating against hostile Indians, and being ordered by his commanding officer, Brigadier General, U. S. Army, to pursue and attack a certain body of Indians (*describing them*), did, by unnecessary delays and want of proper precautions, wholly fail to attack said Indians, but did allow them to attack his command, to its serious disadvantage and detriment.

This at, on or about

Charge.—Conduct to the prejudice of good order and military discipline.

Specification.—In that A. B., First Lieutenant, etc., did in public, in the presence of enlisted men, engage in a noisy and disorderly altercation with another officer, to wit Second Lieutenant C. D., etc., exchanging with him blows and applying to him opprobrious epithets.

This at, on or about

Charge.—Conduct to the prejudice of good order and military discipline.

Specification.—In that A. B., Major, etc., being a disbursing officer of the United States, did, in violation of

Paragraph 590, Army Regulations, gamble and bet at cards for money.

This at, on or about

Charge.—Conduct to the prejudice of good order and military discipline.

Specification.—In that A. B., Private, etc., U. S. Cavalry, did abuse and maltreat his horse, by needlessly and wantonly striking and beating him on the head and body.

This at, on or about

Charge.—Conduct to the prejudice of good order and military discipline.

Specification.—In that A. B., Private, etc., being a member of the guard in charge of certain prisoners employed in working on (*state upon what or how employed*), was so careless and neglectful of his duty that one of said prisoners, to wit C. D., etc., was enabled to make his escape.

This at, on or about

Charge.—Fraudulent enlistment, in violation of the Sixty-second Article of War.

Specification.—In that A. B., by wilfully and falsely representing to C. D., Captain, etc., recruiting officer, that he was twenty-one years of age and had no parent or guardian, whereas in fact he was but eighteen years of years and had a father living, did fraudulently enlist, and procure himself to be enlisted, in the military service of the United States, and did, under and by virtue of said false statements and fraudulent enlistment, procure himself to be paid, and did receive, certain pay and allowances from the United States, to wit (*state amount or nature of pay or allowances*).

This at, on or about

UNDER ARTICLE 65.

Charge.—Breach of arrest, in violation of the Sixty-fifth Article of War.

Specification.—In that A. B., Captain, Company A, — Regiment, etc., having been duly arrested and confined to his quarters, by order of his commanding officer Colonel C. D., etc., did, before being set at liberty, or having his limits enlarged, by his said commander or other competent authority, break his said arrest and confinement by quitting the same and proceeding to assume command of and to drill his said company.

This at, on or about

UNDER ARTICLE 69.

Charge.—Violation of the Sixty-ninth Article of War.

Specification.—In that A. B., Second Lieutenant, etc., being officer of the guard, and having had committed to his charge, as such, a certain prisoner, to wit one C. D., etc., did presume, without proper authority, to release the said prisoner;

Or—did suffer the said prisoner to escape.

This at, on or about

Charge.—Being a spy.

Specification.—In that A. B., Captain, etc., being an officer of the Army of, a public enemy at war with the United States, did, without authority and secretly, lurk and act as a spy in and about, a fortified military post of the armies of the United States, and did there collect material information in regard to the numbers, resources, and operations of said armies, with intent to impart the same to the said enemy.

This, in time of war, at or near the said
on or about

Charge.—Violation of the Laws of War.

Specification.—In that A. B., Captain, etc., being an officer of the army of, an enemy at war with the United States, did unlawfully and without authority penetrate within the lines of the army of the United States, and engage therein in recruiting men for the military service of the said enemy.

This at, on or about

Charge.—Guerilla warfare, in violation of the Laws of War.

Specification.—In that A. B., at a time of war between the United States and, and not being commissioned, enlisted, or employed in the military service of either of said belligerents, but acting independently of the same, did, in combination with sundry other persons similarly acting, engage in unlawful warfare against the inhabitants of the United States, and in the prosecution of such warfare did attack and forcibly enter the dwelling-house of one C. D., a peaceable citizen of the United States, and rob him and his family of money and other property of the value of five hundred dollars, and, upon being resisted by the said C. D., did then and there unlawfully shoot and kill him.

This at, on or about

III.

FORM OF A RECORD OF A TRIAL BY A
GENERAL COURT-MARTIAL.

PROCEEDINGS OF A GENERAL COURT-MARTIAL, in the
case of First Lieutenant.....,
convened by the following Order:

HEADQUARTERS, DEPT. OF.....,
.....1892.

Special Orders }
No..... }

A General Court-Martial is appointed to meet at....
.....at 10 o'clock A. M., on Monday,.....
1892, or as soon thereafter as practicable, for the trial of
First Lieutenant.....,
and such other persons as may be brought before it.

DETAIL FOR THE COURT.

1. Lieutenant Colonel.....
2. Major.....
3. Captain.....
4. Captain.....
5. First Lieutenant.....

Captain.....

Judge Advocate.

A greater number of officers than those named cannot
be assembled without manifest injury to the service.

The travel required by this Order is necessary for the public service.

By command of Brigadier General.....

Assistant Adjutant General.

FIRST DAY.

Pursuant to the foregoing Order, the Court assembled at the place, date, and hour therein specified. Present the following Members:

Lieut. Col.....

Captain.....

Captain.....

First Lieut.....

The Judge Advocate, Captain.....,
and the Accused, First Lieutenant.....,
were also present.

There being no quorum, the members present adjourned to.....at.....o'clock A.M.

SECOND DAY.

Pursuant to the foregoing Order and to adjournment, the Court reassembled at the said place and date, at the hour of o'clock A.M. Present the following Members:

Lieut. Col.....

Major.....

Captain.....

Captain.....

First Lieut.....

The Judge Advocate, Captain.....,
and the Accused, First Lieutenant.....,
were also present.

Major, the
Member absent on the first day, tendered an explanation
in writing of his absence which was directed by the
Court to be annexed to the Record, marked "Exhibit A."

The Judge Advocate stated that he had appointed, as
Reporter for this trial, Mr.....,
who, being introduced, was duly sworn by the Judge
Advocate.

The Accused asked leave to introduce, as his Counsel,
....., Esq., Coun-
sellor at Law. The Court assenting, the Counsel
appeared and took his seat.

The Order convening the Court was then read by the
Judge Advocate, and the Accused was asked if he
wished to object to any of the Members. He thereupon,
through his Counsel, interposed a challenge to Captain
....., on the ground that he had
investigated the case and preferred the charges, and was
to be presumed to have formed an opinion on the merits.

The challenged Member, on being called upon by the
President of the Court for remarks, stated that while he
had in fact preferred the charges after an examination
of the evidence, he did not consider that he had formed
such opinion as materially to affect his impartiality.

After argument by the Judge Advocate and Counsel,
the Court was cleared for deliberation; the challenged
Member, the Accused, and the Judge Advocate, with-
drawing. On the doors being reopened, it was
announced by the President that the challenge was
sustained.

The Accused, being asked if he wished to object to any
other Member, replied in the negative.

The Court being reduced below a quorum, the Judge Advocate was instructed to communicate the fact to the Convening Authority.

The Court thereupon adjourned to.....at
.....o'clock A.M.

THIRD DAY.

.....
.....

Pursuant to adjournment, the Court reassembled at the said place and date at the hour of.....o'clock A.M.
Present the following Members:

Lient. Col.....

Major.....

Captain.....

First Lieutenant.....

The Judge Advocate, Captain.....,
and the Accused, First Lieut.....,
with his Counsel, were also present.

The Proceedings of the foregoing day were read and approved.

The following Order, detailing a new Member, was then read by the Judge Advocate.

(Insert copy of G. O. or S. O.)

The newly-detailed Member, Captain.....
....., took his seat upon the Court.

The Accused, being asked if he desired to object to said Member, replied in the negative.

The Members of the Court were then severally duly sworn by the Judge Advocate, and the Judge Advocate was duly sworn by the President of the Court;—all of which oaths were administered in the presence of the Accused.

The Accused was thereupon arraigned upon the following Charges and Specifications:

(Insert original Charges, etc., or copy.)

To the First Charge ("Disrespect to his Commanding Officer, in violation of the Twentieth Article of War") and its Specifications, the Accused, through his Counsel, interposed the *Special Plea of Former Trial*,—in that he had been arraigned upon the same before a previous General Court-Martial, had duly pleaded thereto, and the proceedings had thereupon been discontinued by the United States, without fault or act of his.

The Judge Advocate replied that, immediately upon the original arraignment, the Court had been dissolved, for the reason that several of the Members had been required for active service in the field; and he contended that, as the proceedings had been carried no farther, there had been no "former trial" in the sense of the 102d Article of War.

The fact in regard to the dissolution of the first Court being conceded, on the part of the Accused, to be as stated,—after argument had upon the Plea, the Court cleared for deliberation (the Accused and Judge Advocate withdrawing); and, on its being reopened, it was announced by the President that the Plea was not sustained.

The Accused, through his Counsel, then *moved to strike out* the Specification to the Second Charge ("Breach of Arrest, in violation of the Sixty-fifth Article of War"), on account of indefiniteness and uncertainty; it averring simply that the Accused, having been confined, etc., did, without authority, "quit his confinement," without setting forth in what the alleged quitting consisted, *i.e.*, where he went or what he did; so that he, the Accused, was not apprised by the Speci-

fication with what particular act he was charged, or what he was called upon to defend.

The Judge Advocate replied, and the Court was then cleared, the Accused and Judge Advocate withdrawing. On reopening, it was announced by the President that the Motion would be granted unless the Judge Advocate should amend the Specification by averring in what act or acts the alleged offence consisted. The Judge Advocate thereupon, by consent of the Court, amended the Specification by adding thereto the words—"by going to, and remaining for one hour at, the quarters of another officer, Captain of said regiment."

The Accused thereupon pleaded to the several Charges and Specifications, as follows:

To the 1st Specification, First Charge—Not Guilty.

To the 2d Specification, First Charge—Not Guilty.

To the First Charge—Not Guilty.

To the Specification, Second Charge—Guilty.

To the Second Charge—Guilty.

The President then directed all persons present as witnesses to leave the court-room and not return until severally called upon to testify.

The Judge Advocate thereupon opened the *Testimony for the Prosecution* by calling as a witness Captain , who, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

Question. Please state your name, rank and office.

Answer. (*Stating particulars in full.*)

Question. Do you know the Accused, First Lieutenant , and, if so, how long and where have you known him?

Answer. I do; I have known him for four years, at , and at

Question. Do you know his commanding officer, Colonel?

Answer. I do.

Question. Were you present at an interview and conversation between the Accused and his said commanding officer, at, on July 1st last?

Answer. I was present and heard the conversation.

Question. Did not the Accused say to the Colonel ...? (*Stating what was alleged in the Specification as claimed to have been said by Accused.*)

The Accused objected to the question as obviously leading.

The Court, without clearing, sustained the objection.

Question. State all that you heard said at that interview.

Answer. What I heard was as follows. (*States details of conversation.*)

Direct Examination closed.

Cross-examination by the Accused.

Question. How near were you to the parties at this conversation?

Answer. I was within about ten feet.

Question. How did the Accused appear—excited or the reverse?

Answer. Somewhat excited but not violent.

Question. Did you consider his manner disrespectful?

The Judge Advocate objected to the question as calling for the opinion of the witness on the merits of the charge.

The Accused, by his Counsel, modified the question as follows:

Question. State more precisely what was the manner of the Accused.

Answer. His manner was decided, and, as I said, rather excited, but, apart from the words used, not offensive.

Cross-examination closed.

Examination by the Court.

Question. What was the manner of Colonel
..... on this occasion?

Answer. Short and emphatic.

The examination of the witness being closed, his testimony was read over to him, and pronounced by him to be correctly recorded.

The hour of 3 P.M. having arrived, the Court adjourned to at 9 o'clock A.M.

FOURTH DAY.

.....
.....

Pursuant to adjournment, the Court reassembled at the said place and date and at the hour appointed. Present all the Members, to wit:

Lieut. Col.

Major

Captain

Captain

First Lieut.

The Judge Advocate, Captain, and the Accused, First Lieut., with his Counsel, were also present.

The Proceedings of the previous day were read and approved.

Sergeant, a witness for the prosecution, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

* * * * *

Cross-examination by the Accused.

* * * * *

The Judge Advocate then introduced, on the part of the prosecution, the *Depositions* of Corporal and Private, taken (in order to avoid the necessity for a continuance) under a *Stipulation* entered into between the Judge Advocate and the Accused prior to the assembling of the Court. These Depositions are hereto annexed, marked "Exhibits B" and "C."

The Judge Advocate announced that the prosecution here rested.

A. B., Quartermaster's employee, a witness on the part of the *Defence*, was then called, and, being duly sworn, testified, in answer to questions by the Accused, as follows:

* * * * *

Cross-examination by the Judge Advocate.

* * * * *

Private, a witness on the part of the *Defence*, was then duly sworn.

A Member of the Court called attention to the fact that this witness was not in full uniform or clean. The Court, through the President, directed the witness to return to his quarters, clean himself, and report again in a neat and tidy condition and in his proper uniform.

At this stage, the proceedings of the Court were disturbed by a loud and violent altercation between two enlisted witnesses in the adjoining witness-room. At the suggestion of a Member, the Court was cleared for deliberation, the Accused and Judge Advocate withdrawing. On its reopening, the disorderly parties were brought before the Court, and called upon to show cause why they should not be punished as for a contempt according to the 86th Article of War. Having

no explanation or excuse to offer, they were adjudged by the Court to be confined, each 48 hours, in the Post guard-house.

Private, having reported to the Court in a proper condition, then testified, in answer to questions by the Accused, as follows:

* * * * *

The Judge Advocate waived cross-examination.

The hour of adjournment, as fixed by the 94th Article of War, having arrived, the Court adjourned to meet on the following day at 8 o'clock A.M.

FIFTH DAY.

.....

.....

Pursuant to adjournment, the Court reassembled at the said place and date, and at the appointed hour. Present all the Members, to wit:

Lieut. Col.

Major

Captain

Captain

First Lieut.

The Judge Advocate, Captain, and the Accused, First Lieut., with his Counsel, were also present.

The Proceedings of the previous session were read and approved.

Brig. Gen., a witness on the part of the Defence, being duly sworn, testified as follows:

Question by the Accused. Please state to the Court what you know of the character and services of the Accused as an officer.

Answer. * * * * *
 * * * * *

The Accused then introduced, without objection on the part of the Judge Advocate, an Official Statement of his service, as furnished from the Adjutant General's Office, and hereto annexed, marked "Exhibit D."

The Accused, by his Counsel, announced that the Defence here rested.

The Judge Advocate, by way of rebutting evidence, then introduced, as a witness, C. D., a civilian, who, being duly sworn, testified as follows:

Question. State your name, residence, and occupation.

Answer. My name is, my residence, and my occupation

Question. Do you know A. B., Quartermaster's employee, and how long have you known him?

Answer. I have known him for ten years past.

Question. Do you know his general character for truth and veracity, and if so what is it?

Answer. It is very bad.

Cross-examination.

Question. How do you know the character of A. B. for veracity?

Answer. Mainly from my own knowledge and experience of him—my own transactions with him.

Question. Have you heard other persons speak of his want of veracity, and if so what persons?

Answer. I may have, but I do not remember what persons.

The Accused then moved to strike out all the testimony of C. D., relating to the veracity of A. B., as not being evidence of *general reputation*, but merely or substantially a statement of the individual opinion of the witness founded on his own personal relations with A. B.

The Judge Advocate replied, and the Court was

cleared, the Accused and the Judge Advocate withdrawing. On reopening, it was announced by the President that the motion was granted.

The testimony on both sides being closed, the Accused, by his Counsel, read to the Court the Address, hereto annexed, marked "Exhibit E."

The Judge Advocate then read an Address, hereto annexed, marked "Exhibit F."

The Accused and the Judge Advocate then withdrew, and the Court was cleared and closed for deliberation on its judgment, and after due consideration, found the Accused, First Lieutenant, as follows:

Of the 1st Specification, First Charge—Guilty, except as to the words "*rudely and violently*," substituting the words—*in a decided manner*.

Of the First Charge—Not Guilty.

Of the Specification, Second Charge—Guilty, confirming his Plea.

Of the Second Charge—Guilty, confirming his Plea.

And the Court did thereupon * sentence him, the said First Lieutenant, *To be dismissed from the military service of the United States.*

We certify that the above is a correct and true record.

.....
(Signature of President.)

.....
(Signature of Judge Advocate.)

(Exhibits A, B, C, D, E and F,—each on a separate sheet or sheets.)

* As to the introduction of evidence of *previous convictions* in a case of an enlisted man, see form on page 424.

RECOMMENDATION.

The undersigned Members of the Court, in consideration of the record and services of the Accused in the late war and subsequently, as exhibited by the testimony, do recommend a commutation, by the reviewing authority, of the sentence of dismissal made mandatory by the 65th Article of War.

.....

 (Signatures of Members.)

PROCEEDINGS ON REVISION.

.....

 The Court reassembled, pursuant to the following Order. Present all the Members.

(Insert copy of Order requiring the Court to reassemble for the correction of its record by supplying a finding to the 2d Specification of the First Charge, omitted in the Record.)

The Court thereupon proceeded to supply the omission indicated in the Order, by further finding the Accused, First Lieutenant, as follows:

Of the 2d Specification, First Charge—Not Guilty.

And the Court thereupon adjourned.

We certify the above to be a correct and true record.

.....
 (Signature of President.)

.....
 (Signature of Judge Advocate.)

ACTION.

HEADQUARTERS,

.....
 In the case of First Lieutenant,
 U. S. Army, the proceedings, findings, and sentence are
 approved, and, in compliance with the 106th Article of
 War, the record is forwarded for the action of the Presi-
 dent.

.....
 Brig. Gen. Commanding.

EXECUTIVE MANSION.

.....
 The sentence in the foregoing case of First Lieu-
 tenant, U. S. Army, is confirmed,
 but, in consideration of the recommendation of the
 Members of the Court, is commuted to *suspension from*
rank and command on half pay, for one year.

.....
 President.

IV.

FORM OF A RECORD OF TRIAL BY GARRISON COURT-MARTIAL.

Proceedings of a Garrison Court-Martial, in the case of Private, Co. A, 1st Regt. U. S. Infantry, convened by the following Order:

HEADQUARTERS, POST OF
..... 1892.

Post Orders }
No. }

A Garrison Court-Martial is hereby ordered to assemble at these Headquarters on Monday, 1892, at 10 o'clock A.M., or as soon thereafter as practicable, for the trial of Private, Co. A, 1st Regt. U. S. Infantry, and such other persons as may be brought before it.

DETAIL FOR THE COURT.

1. Captain.....
2. First Lieutenant.
3. Second Lieutenant
- Second Lieutenant, Judge Advocate.
- By command of Major,
Post Commander.

First Lieut.,
Adjutant.

.....
.....

Pursuant to the foregoing Order, the Court assembled at the place, date and hour therein specified. Present, all the Members as follows:

1. Captain
2. First Lieut.
3. Second Lieut.

The Judge Advocate, Second Lieut., and the Accused, Private, Co. A, 1st Regt. U. S. Infantry, were also present.

The Order convening the Court was then read by the Judge Advocate, and the Accused, being asked if he wished to object to any of the Members, answered in the negative.

The Members of the Court were then severally duly sworn by the Judge Advocate, and the Judge Advocate was duly sworn by the President of the Court, all of which oaths were administered in the presence of the Accused.

The Accused was thereupon arraigned upon the following Charge and Specification:

Charge.—Absence without leave.

Specification.—In this, that Private, Co. A, 1st Regt. U. S. Infantry, did absent himself from his company and from the Post of, without authority, from Retreat on October 1st till after Reveille, on October 2d, 1892.

This at, on or about the dates above mentioned.

To which Charge and Specification the Accused pleaded as follows:

To the Specification—Not Guilty.

To the Charge—Not Guilty.

Sergeant, being duly sworn as a witness for the prosecution, in answer to questions by the Judge Advocate, testified as follows:

Question. State your name, rank, etc.

Answer. Sergeant
Co. A, 1st Regt. U. S. Infantry.

Question. Do you know whether the Accused, Private
....., of said company, was absent without leave on the night of Oct. 1st last?

Answer. I do, for the reason that he is noted as absent without authority at Reveille, Oct. 2d, on the Company Morning Report of that date, as shown by the original report.

(Produces Report Book.)

The Judge Advocate then offered in evidence a copy of said morning report.

The Accused objected to the admission of the report on the ground that the note or entry was not competent evidence of the *fact* of his unauthorized absence, but simply showed that he had been *charged* with that offence.

The Judge Advocate replied; the Court (the Accused and Judge Advocate withdrawing) was cleared; and on reopening it was announced by the President that the objection was sustained.

The Judge Advocate then introduced as a witness for the prosecution Captain, who, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

Question. State your name, rank and command.

Answer. Captain, commanding
Co. A, 1st Regt. U. S. Infantry.

Question. Is the Accused a Private of your Company and command?

Answer. He is.

Question. Was he absent from the Company on Oct. 1st or 2d last?

Answer. He was so absent from Retreat on Oct. 1st till some time after Reveille on Oct. 2d.

Question. Was he authorized by you to be so absent, either by pass or otherwise?

Answer. He was not. He was absent without any pass or other authority whatever.

The Prosecution closed.

The Accused having no defence to make, stated to the Court as follows: "I have been only three months in the service. When I absented myself as charged, it was in company with several old soldiers, one of whom was a corporal."

The Accused and the Judge Advocate then withdrew, and the Court was cleared for deliberation on its judgment, and, after due consideration, found the Accused as follows:

Of the Specification—Guilty.

Of the Charge—Guilty.

The Accused and Judge Advocate were then recalled, and the following evidence of *previous convictions* was offered by the latter.

.....

The Accused and the Judge Advocate then withdrew, and the Court did thereupon sentence him, the said Private....., Co. A, 1st Regt. U. S. Infantry—To forfeit ten dollars (\$10) of his pay.

We certify that the above is a true and complete record.

.....

(Signature of President.)

.....

(Signature of Judge Advocate.)

HEADQUARTERS, POST OF.....

.....
In the case of Private....., Co. A, 1st
Regt. U. S. Infantry, the proceedings, findings and sen-
tence are approved. In consideration of the fact that
the accused was a recruit, and that his offence was com-
mitted in company with older soldiers, one of whom was
a non-commissioned officer, who should have set him a
better example, his sentence is mitigated to a forfeiture
of five dollars of his pay.

.....
Post Commander.

V.

SUBPCENA FOR CIVILIAN WITNESS.

UNITED STATES }
vs. } Subpcena.

The President of the United States, to.....Greeting:

You are hereby summoned and required to be and appear in person, on the.....day of....., 18..., at....., before a General Court-Martial of the United States (convened by Special Orders No., Headquarters, Department of....., dated....., 18...); then and there to testify and give evidence as a witness for the.....in the above-named case. And have you then and there this precept.

Dated at....., on....., 18...

.....
 (Official signature of Judge Advocate of the Court.)

 SUBPCENA DUCES TECUM.

Same as above, adding at end as follows:

And you are hereby required to bring with you, to be used as evidence in said case, the following described documents, to wit:

(Specify the documents or papers called for.)

RETURN OF SERVICE OF SUBPŒNA.

(To be indorsed on Original.)

.....

.....

I certify that I made service of the within subpœna
 on....., the witness named therein, by delivering
 to him in person a true copy of the same at.....
 on the.....day of....., 18...

.....

(Signature.)

VI

FORM OF PROCESS OF ATTACHMENT OF
WITNESS.

| | | |
|---------------|---|-------------------------|
| UNITED STATES | } | Attachment for Witness. |
| <i>vs.</i> | | |
| | | |

The President of the United States, to..... Greeting:

Whereas, at....., on the day of, 18.., a subpoena was duly personally served on..... of, requiring him to be and appear in person to testify as a witness for the..... in the above-named case, at, on the day of, 18.., at o'clock, .. m., before a General Court-Martial of the United States, duly convened by the order of, in and by Special Orders, No., Headquarters, Department of, dated....., 18..;

And whereas the said has disobeyed and wholly failed to comply with the said subpoena;

Now, therefore, by the authority and in pursuance of Section 1202 of the Revised Statutes of the United States, you are hereby commanded and empowered to take and attach the said, wherever he may be found within the United States, and forthwith bring him before the said General Court-Martial assembled at

..... aforesaid, then and there duly to testify as a witness in said case, as in and by the said subpoena summoned and required.

Dated at on, 18..

.....

(Official signature of Judge Advocate of the Court.)

VII.

FORM OF DEPOSITION, BY STIPULATION.

BEFORE A GENERAL COURT-MARTIAL, convened by Special Order, No., Headquarters, Department of , 188..

UNITED STATES

vs.

..... } Stipulation for Deposition.

It is hereby stipulated and agreed by and between the undersigned,, the Judge Advocate of the said Court, in said case, and, the accused party therein, that the Deposition of....., a Witness (or Witnesses) for the in said case, now at....., may be taken by such officer or person as may be designated by the proper authority, upon the Interrogatories hereto annexed and agreed upon by the said parties, and that said Deposition may be read as evidence before the Court in said case, according and subject to the provisions of the Ninety-first Article of War, and subject to such objections to the answers as the rules of evidence may justify. And it is further stipulated and agreed that said Deposition, when complete, shall be transmitted to the President of said Court, and shall be first

opened by him in the presence of the Court and of the parties hereto.

Subscribed at on

.....
(Official signature of Judge Advocate.)

.....
(Signature of Accused.)

INTERROGATORIES

To be propounded to, a Witness
for the in the above-mentioned case,
according to the annexed stipulation:

FIRST INTERROGATORY.

.....

SECOND INTERROGATORY.

.....

THIRD INTERROGATORY.

.....

etc.

etc.

etc.

THE DEPOSITION

Of, a Witness
for the in the above-mentioned case, who,
being first duly sworn, makes answer to the Interroga-
tories appended hereto and to the foregoing Stipulation,
as follows:

ANSWER TO FIRST INTERROGATORY.

.....

ANSWER TO SECOND INTERROGATORY.

.....

ANSWER TO THIRD INTERROGATORY.

.....

etc.

etc.

etc.

.....
(Signature of the Deponent.)

AUTHENTICATION.

STATE OF } ss.
 County of

I, of
 a, duly appointed and qualified, do
 certify that on the day of, per-
 sonally appeared before me,,
 the witness named in the foregoing Stipulation and
 Deposition, who, having been by me first duly sworn,
 made response to the annexed Interrogatories in words
 and figures as in the appended answers set forth and
 contained, and further, that he thereupon subscribed the
 said Deposition in my presence.

[SEAL, if any.]

.....
 [Signature of the Notary, Justice of the
 Peace, or other qualified official, by
 whom the oath was administered.]

.....

I,, the officer
 designated and directed by
 to cause to be taken the deposition of the within-named
, do certify
 that the same was duly made and taken under oath as
 hereinbefore set forth and contained.

.....
 (Official signature of officer.)

VIII.

FORM OF RETURN TO A WRIT OF HABEAS
CORPUS, ISSUED BY A STATE COURT.

[Name of the Court.]

In re } On Habeas Corpus.
 } Return of Respondent.

To the Honorable, Judge of said Court:

The Respondent in said case, Captain
, United States Army, upon whom has
 been served the writ of *habeas corpus* therein issued, re-
 spectfully makes return to the same, and states to this
 Honorable Court that he holds the above-named
 by the authority of the United States, as
 a deserter from the Army of the United States, under
 circumstances as follows, to wit:

That the said was, at,
 on, 18.., duly enlisted in the United States
 military service, as a private soldier of the regi-
 ment of, for the term of five years from the
 said date of enlistment;

That, at, on, 18.., the
 said deserted from said service
 and regiment, and did remain unlawfully absent as a
 deserter therefrom until his apprehension as such, as
 hereinafter specified;

That, at, on, 18.., the said was duly apprehended as a deserter from said service and regiment by, and thereupon duly committed by said to the custody and charge of this Respondent, then and now commanding the Post of

That a charge for his said desertion, a copy of which is hereto annexed, has been duly preferred against the said, with a view to his trial thereon by a General Court-Martial; and that it is proposed to bring him to trial thereon without unreasonable delay, by and before a General Court-Martial convened (*or to be convened*) by (*specify Commander and Order if any*).

Wherefore, without intending any disrespect to this Honorable Court, but for the reason that he is advised and believes that, under the rulings of the Supreme Court of the United States, this Court is not empowered to order the release of a prisoner held under and by virtue of the authority of the United States; and in obedience to the order of the President of the United States, of July 18, 1871, as set forth in par. 970 of the General Regulations for the Army of the United States, this Respondent respectfully declines to produce to this Court the body of the said, deserter as aforesaid.

Dated at, on, 18..

.....
(Official signature of Respondent.)

NOTE.—If the enlistment paper of the soldier is accessible, a copy may well be annexed to the return, as may also an order of arrest, commitment, etc. (if any), or other written evidence going to identify the soldier or illustrate his status. For a form of return by an officer commanding a Military Prison, see case of *In re Kaulbach*, published in G. O. 7, Division of the Pacific, 1885.

FORM OF RETURN TO A WRIT OF HABEAS CORPUS
ISSUED FROM A FEDERAL COURT.

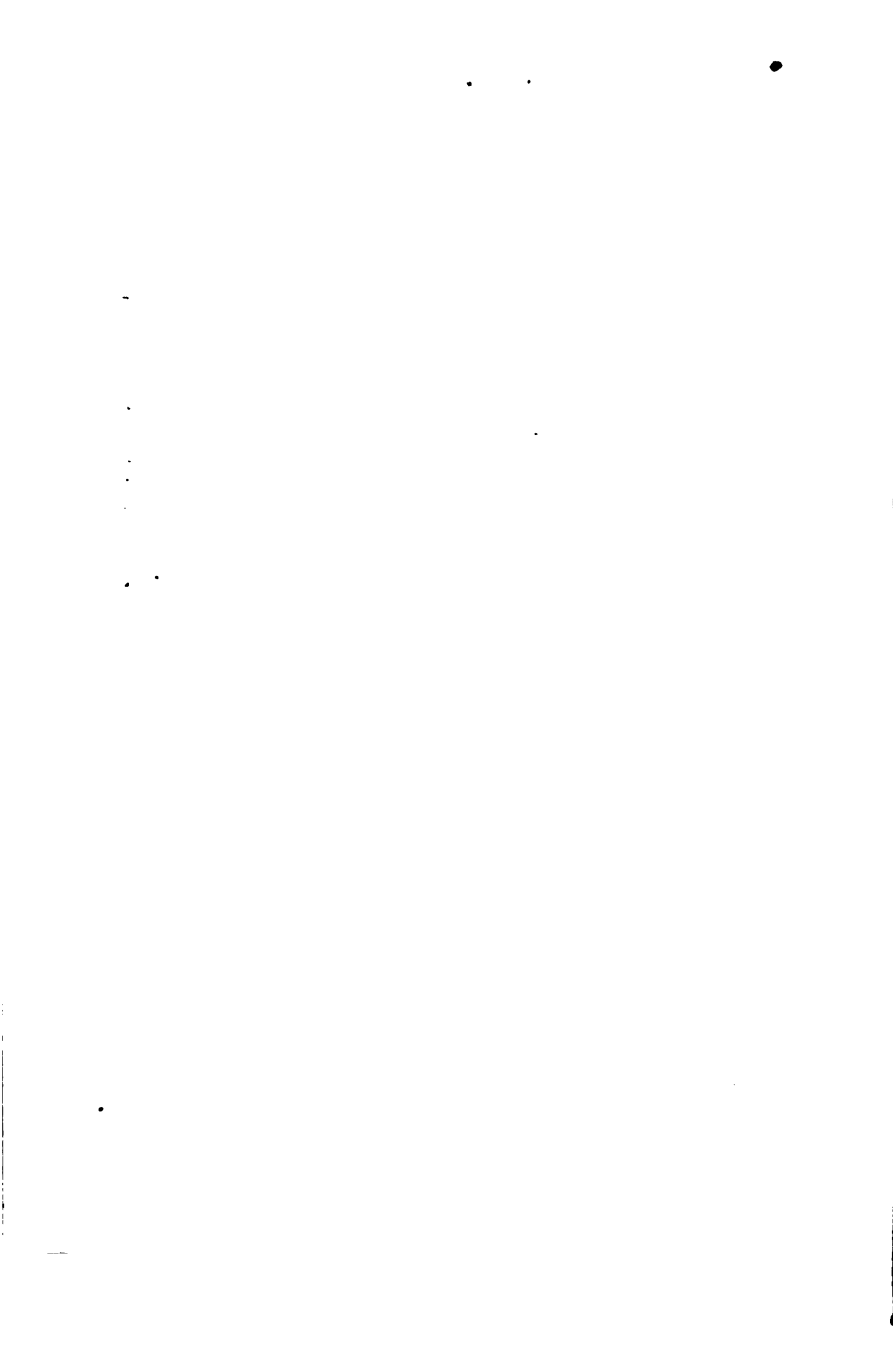
The same, in general, as in the preceding form, except as to the *concluding paragraph*—for which substitute the following:

In obedience, however, to the said writ, the Respondent herewith produces before this Honorable Court the body of the said, for such disposition and orders as by this Court may be deemed to be legally required and appropriate.

.....

(Signature of Respondent.)

Dated at, on, 18..



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